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SYMPOSIUM ON MISSISSIPPI RULES OF CIVIL PROCEDURE

FOREWORD

In 1975 the Mississippi Legislature created an Advisory Committee on the Rules of Civil Practice and Procedure to undertake "a comprehensive and continuing study . . . of civil practice and procedure in the trial courts of this state" and to "draft such rules pertaining thereunto as it concludes will simplify, improve and expedite the administration of justice." The Advisory Committee completed a preliminary draft of the proposed Mississippi Rules of Civil Procedure in July, 1977. The proposed rules were then distributed to the state's judges, clerks of courts, bar officers and others associated with the legal profession in order to make the work available to the attorneys in the state. The Advisory Committee conducted open meetings during July and August of 1977 to discuss the proposed Rules and receive suggestions for their improvement. A significant result of the discussions at the open meetings was the change in the wording of the rules concerning discovery. One year later the Advisory Committee formally submitted the proposed Rules to the Mississippi Supreme Court. Pursuant to the statutory procedure the supreme court submitted the proposed Rules to the legislature in 1979 and again in 1980. The legislature through its judiciary committees sitting en banc disapproved the Rules in toto.

Acting pursuant to its constitutional authority, the supreme court adopted the proposed Rules on May 26, 1981, for use in civil actions in all circuit, chancery, and county courts filed on and after January 1, 1982. During the 1982 session, the Mississippi legislature passed Senate Bill No. 2714, which purports to give the legislature the power to disapprove any rules promulgated by the supreme court. On March 5, 1982, the supreme

court deleted rule 14 entirely and amended rule 4 by deleting the text as originally adopted and substituting the prior statutory procedure for service of process. The changes pursuant to the March 5 order became effective May 1, 1982.

By this same order the supreme court submitted the remainder of the Rules to the Mississippi legislature for "advice and comments"; but the supreme court in its order specifically stated that the court reserves ruling on the constitutionality of Senate Bill No. 2714. In the closing days of the 1982 session, the legislature by Concurrent Resolution No. 617 disapproved rules 3, 12, 13, 41, 47, 49, 55, 56, and 83. If Senate Bill No. 2714 were held to be constitutional, then under the provisions of said bill and concurrent resolution, the nine rules listed above would not be effective after May 1, 1982. As mentioned above, however, the supreme court in its March 5 order expressly reserved ruling as to the constitutionality of Senate Bill No. 2714, and as this Symposium goes to the printer, the supreme court has not issued a formal ruling or order with regard to the aforementioned acts of the legislature.

As a service to the Mississippi legal community, the *Mississippi Law Journal* presents this Symposium on the Mississippi Rules of Civil Procedure. Practitioners, scholars, and judges have contributed to the Symposium in an effort to facilitate a practical understanding of the Rules. The supreme court's order of March 5 came too late for major alterations in the articles that follow. The reader should be aware that the portions of the symposium that address rules 4 and 14 are, at least in the near future, inapplicable.

RULES 4, 5, 7-11, and 15

I. Rule 7—Pleadings Allowed

A primary objective of the new Mississippi Rules of Civil Procedure is to streamline the progress of a case through the courts. Rule 7 pursues this goal by reducing the number and complexity of the pleadings. In the ordinary case, pleadings are now limited by this rule to a complaint, an answer, and a reply to a counterclaim or cross-claim contained in the answer.[1] Demurrers, pleas, and exceptions for insufficiency of a pleading are expressly abolished by section (c), and their functions are absorbed by motion practice, which is a topic discussed in another section of this symposium.

Rule 7 requires a reply only if the answer contains a counterclaim denominated as such.[2] Affirmative defenses in the answer are deemed denied or avoided, thus obviating the need for a reply.[3] If an answer contains an undenominated counterclaim, it would be advisable to reply although the rule does not strictly require it. A reply to a counterclaim is necessary because a counterclaim is an action that could have been brought on its own complaint but for rule 13(a) that requires such claims to be asserted in the present action.

Claims for affirmative relief from co-defendants are included in the answer as cross-claims. Cross-claims were previously available in chancery practice[4] but not in circuit practice.[5] Ordinarily cross-claims are claims, including those for indemnification among co-defendants, that could have been brought in

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[1] Miss. R. Civ. P. 7(a) permits additional pleadings in two other situations: where a party is brought into a lawsuit pursuant to rule 14 and where the court orders a reply to an answer or a third-party answer.

[2] *Id.* 7(a).

[3] *Id.* 8(d). This area of prior practice was previously governed by Miss. Code Ann. § 11-7-59(4) (1972).

[4] *See* Miss. Code Ann. § 11-5-37 (Supp. 1981) (permitting defendant in chancery suit to make his answer a cross-bill against co-defendant).

[5] *See* Rosetti v. Stein, 272 So. 2d 633, 634 (Miss. 1973) (right of defendant to assert counterclaim does not extend to co-defendant in same proceeding).

separate suits.

As is the case with the answer, it is not necessary in the reply to deny affirmative matter asserted in a counterclaim or a cross-claim.

II. Rule 8—General Rules of Pleading

The purpose of pleadings under the new Mississippi rules is limited to giving notice to the parties. The functions of issue formulation and fact revelation, which were inadequately performed by pleadings under prior practice, will now be accomplished by the discovery process and the pretrial conference.[6] In furthering this more restrictive purpose, rule 8(a) states that any pleading that sets forth a claim for relief should contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." The rule also provides that relief of several different types or relief in the alternative may be demanded. The previous necessity of distinguishing between ultimate facts, evidence, and conclusions of law is abolished.[7] The new Rules do not forbid the pleading of facts or legal conclusions provided the parties receive fair notice. The claim for relief must still be supported by statements of underlying circumstances, occurrences, and events but, as evidenced by the forms accompanying the Rules, such statements may be delineated more generally than under prior practices.[8]

Rule 8(b) requires that the answer be as simple as the complaint. Defenses to each claim are to be stated briefly and plainly and shall admit or deny the averments of the adverse party. Under the new Rules, party is deemed to have denied an averment if he lacks knowledge or information sufficient to form a belief as to its truth and he so states. This is contrary to prior

---

[6] *See* Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (noting similar impact of federal rules on federal practice); *see also* C. Wright, Law of Federal Courts § 68 (3d ed. 1976) (federal rules provide an efficient mechanism for performing the historic functions of pleadings).

[7] *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1218 (1969) (noting difficulty of logically distinguishing "evidence," "facts," and "conclusions").

[8] Miss. R. Civ. P. forms 2-21 provide examples of simplified statements of facts.

practice.[9] The rule avoids placing the pleader in the difficult position of admitting a possibly false averment or of making a false representation as to his knowledge by denying it. Nevertheless, free use of discovery should make this an uncommon problem.

Rule 8(b) also allows use of a general denial when the pleader intends in good faith to controvert all of the preceding pleading; otherwise he must make specific denials of designated averments or paragraphs, admitting so much as is true and material and denying only the remainder.

Section (d) of rule 8 conforms to prior practice by requiring affirmative pleading of certain defenses, a partial list of which is included in section (c) of the rule. Generally, failure to plead an affirmative defense results in its waiver; however, certain defenses in rule 12(b) may be made by motion. Averments made in a pleading to which a response is required that are not denied in the responsive pleading are deemed admitted. If no responsive pleading is required or permitted, such averments are taken as denied or avoided. Thus, in the ordinary case, affirmative defenses are deemed denied by the plaintiff, counterclaimant, or cross-claimant without need of a reply.

Subsection (e)(2) of rule 8 allows for pleading alternatively or hypothetically in one count or defense or in separate counts or defenses. This is in contrast to former practice, which generally followed the rule against duplicity in pleading.[10]

In a further departure from prior practice, rule 8(f) states that "pleadings shall be so construed as to do substantial justice." Formerly, pleadings were construed most strongly against the pleader.[11]

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[9] *See* Mathis v. Great S. Wirebound Box Co., 238 Miss. 1, 7, 116 So. 2d 813, 814 (1960) (answer evidencing uncertainty as to authenticity of note constituted evasive, insufficient pleading); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 351 (2d ed. 1950) (where defendant lacks personal knowledge, his answer must recite whatever information and beliefs he possesses and not merely his information). In his treatise on chancery practice, Justice Griffith noted the importance of not confusing the requirements under Mississippi practice pertaining to a defendant's answer with those allowed under rule 8(b) of the Federal Rules of Civil Procedure. *Id.* § 351, at 337 n.13.

[10] *See* V. GRIFFITH, *supra* note 9, § 177 (allegations in complaint must be consistent). Former practice was modified by statute. *See* MISS. CODE ANN. § 11-7-36 (Supp. 1981) (allowing alternative pleading of torts and contracts).

[11] Taylor v. Twiner, 193 Miss. 410, 419, 9 So. 2d 644, 646 (1942).

Rule 8(g) makes no change in traditional practice, and section (h) is intended to ensure notice if the pleader is suing or defending in the interest of another.

III. Rule 9—Pleading Special Matters

Rule 9 relates to the content rather than the form of pleadings and differs insignificantly from prior practice. Basically unchanged are the requirements for pleading the capacity in which one sues or is sued;[12] fraud or mistake;[13] performance or occurrence of conditions precedent;[14] official documents, ordinances, or acts;[15] judgments;[16] and special damages.[17] It is necessary to aver with particularity the circumstances constituting fraud or mistake, but malice, intent, knowledge, and other conditions of mind may be averred generally.[18] Rule 9(d) renders a minor change in the pleading of statutes by no longer requiring that a certified copy of the ordinance be attached.[19]

Rule 9(f) institutes an important change from prior practice by making averments of time and place material in testing the sufficiency of a pleading. Common law practice treated time and place as immaterial to a statement of a cause of action unless time was a material part of the substance of the case, such as the

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[12] *See* V. Griffith, *supra* note 9, § 164 (bill of complaint must identify capacity of each party suing or being sued).

[13] *See* McMahon v. McMahon, 247 Miss. 822, 836, 157 So. 2d 494, 501 (1963) (allegations of fraud must be clearly pled).

[14] *See* Miss. Code Ann. § 11-7-109 (1972) (performance of conditions precedent may be generally averred but denial must be specific).

[15] *See id.* § 11-7-105 (private statutes are sufficiently pleaded by reference to their titles and dates of passage); *id.* § 13-1-147 (private legislative acts may be generally pleaded).

[16] *See id.* § 11-7-111 (judgment may be pled simply by stating that it was given or made).

[17] *See* Vicksburg & M.R.R. v. Ragsdale, 46 Miss. 458, 478 (1872) (special damages must be specifically pled).

[18] Miss. R. Civ. P. 9(b). *But see* Benson v. Hall, 339 So. 2d 570, 572-73 (Miss. 1976) (conclusory allegation that publication of libelous statement was made with malice was not admitted on demurrer absent supporting facts); Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 589-90, 93 So. 2d 171, 173 (1957) (allegations of malice without additional facts were conclusions of the pleader).

[19] *But cf.* White v. Thomason, 310 So. 2d 914, 917 (Miss. 1975) (municipal ordinances are not judicially noticed and must be specifically pled).

date of a written instrument being sued upon.[20] The purpose of the new provision is to "facilitate the identification and isolation of the transaction or event in issue and . . . provide a mechanism for the early adjudication or testing of certain claims and defenses—most notably, the statute of limitations."[21]

Rule 9(g) works no real modification of prior practice since it provides that special damages must be specifically pleaded. Rule 9(h) is derived from section 11-7-39 of the Mississippi Code, and rule 9(i) is adopted from section 11-5-11; neither rule alters prior Mississippi practice.

IV. Rule 10—Form of Pleadings

Rule 10(a), which makes no substantial change in prior Mississippi practice, requires every pleading to have a caption containing the name of the court, the title of the action, the file number, and a designation of the type of pleading. The complaint is the only pleading requiring the names of all the parties; subsequent pleadings need state only the name of the first party on each side with *et al.* to indicate the other parties.[22]

Section (b) of rule 10 requires that the first paragraph of a claim for relief contain the names and addresses, if known, of all the parties to the claim. The averments of a claim or defense are to be stated in numbered paragraphs that should be limited, if practical, to a single set of circumstances. Once stated, the paragraph may be referred to by its number in all subsequent pleadings. Claims based on separate transactions or occurrences and defenses other than denials should be stated in separate counts when such a separation helps to present their contents clearly. If the demands of this section are not met, the correct remedy is by motion.[23]

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[20] *See* V. Griffith, *supra* note 9, §§ 171-172 (circumstances of time and place must be clearly and accurately alleged where essential).

[21] 5 C. Wright & A. Miller, *supra* note 7, § 1308.

[22] Rule 7(a) sets forth the types of allowable pleadings.

[23] Although rule 12 does not contain an express provision allowing for a motion to urge compliance with rule 10(b), the primary basis for securing compliance in federal court is a rule 12(e) motion for a more definite statement. *See, e.g.*, Jenn-Air Prods. Co. v. Penn Ventilator, Inc., 283 F. Supp. 591, 595-96 (E.D. Pa. 1968) (defendant may file a rule 12(e) motion if plaintiff's complaint fails to comply with 10(b)), *rev'd and remanded*

Rule 10(c) allows statements in a pleading to be adopted by reference in the same or a different pleading or in any motion. Furthermore, copies of written instruments that are exhibits to pleadings are made parts thereof for all purposes.

Section (d) of rule 10 differs from its federal counterpart by continuing the Mississippi practice of attaching to or filing with the pleading a copy of accounts or other written instruments on which a claim is founded unless sufficient justification for omission is stated in the pleading.[24]

V. Rule 11—Signing of Pleadings and Motions

Rule 11(a) slightly modifies prior Mississippi practice by requiring that a party's attorney or the party himself, if unrepresented, shall sign all pleadings or motions and state his address.[25] This rule represents a significant departure from past practice[26] by providing that pleadings need not be verified or accompanied by affidavit unless a rule or statute specifically provides otherwise. The rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses[27] is expressly abolished.

Rule 11 is significant because it provides for sanctions against an attorney who fails to comply. Section (a) states: "The signature of an attorney constitutes a certificate by him that he has read the pleading or motion; that to the best of his knowl-

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on other grounds, 464 F.2d 48 (3d Cir. 1972); Ames v. Associated Musicians of Greater New York, Local 802, 47 F.R.D. 540, 542 (S.D.N.Y. 1968) (rule 12(e) motion sustained against a 30-page complaint consisting of 125 paragraphs). *See generally* 2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 10.04 (1981 & Supp. 1981-82) (discussion of proper motion to compel compliance with rule 10(b)).

[24] *See* Miss. Code Ann. § 11-7-47 (1972) (writing to be annexed to or filed with pleading).

[25] *See id.* § 11-5-9 (pleadings must be subscribed to by party or attorney); *id.* § 11-7-91 (pleading shall be signed by party or his attorney).

[26] *See id.* § 11-5-21 (attorney required to certify his belief that demurrer should be sustained); *id.* § 11-5-29 (answer shall be sworn to by defendant unless plaintiff waives a sworn answer; defendant corporation's answer shall be sworn to by a general officer unless a sworn answer waived); *id.* § 11-5-31 (listing persons before whom answers of nonresidents may be sworn to); *id.* § 11-5-33 (where complainant swears to bill, rule requiring two witnesses, or one witness and corroborating circumstances, to overcome an answer denying the allegations in the complaint is abolished).

[27] *Id.* § 11-5-33.

edge, information, and belief there is good ground to support it; and that it is not interposed for delay." Failure to sign a pleading or signing with intent to defeat the rule may lead to the pleadings being stricken as false or a sham, and willful violation may subject an attorney to appropriate discipline. Similar action may be taken for insertion of indecent or scandalous matter. A further sanction is provided against a party found by the court to have filed pleadings or motions that are frivolous or intended to cause harassment or delay; the court may order payment of the opposing party's reasonable expenses and the expenses of his attorney including reasonable attorney's fees. This sanction should be limited to the costs of opposing the motion.

VI. Rule 15—Amended and Supplemental Pleadings

Rule 15 expands the traditional rule in Mississippi governing amendments to pleadings.[28] In a procedure that varies little from that under the statutes,[29] a party may amend a pleading without leave of court at any time before a responsive pleading is served or, if no response is permitted and the action has not yet been placed on the trial calendar, at any time within thirty days of service. This represents a departure from federal rule 15, which limits a party to one amendment without leave of court. The Mississippi rule also preserves the traditional demurrer practice by allowing thirty days for amendments if a rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or a 12(c) motion for judgment on the pleadings is granted; the practice is limited to situations where matters outside the pleadings are not presented at the hearing on the motion. If extraneous matters are presented, the motion is treated as one for summary judgment under rule 56 and no amendment is allowed. In a modification of past prac-

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[28] *See id.* § 11-5-45 (insufficient answer may be amended); *id.* § 11-5-115 (allowing court to permit amendments in any pleading or proceeding to ensure fair trial on merits); *id.* § 11-5-117 (variance between allegation in pleading and proof may be amended). *See generally* V. Griffith, *supra* note 9, §§ 388-398 (discussion of amendments under prior practice).

[29] *See* Miss. Code Ann. § 11-7-55 (1972) (plaintiff may amend declaration without court order before defendant replies); *id.* § 11-5-57 (complainant may amend bill without application to the court before defendant makes a defense).

tice,[30] a party must now answer an amended pleading within the time remaining for response to the original pleading or within ten days, whichever is longer.

In a situation where multiple defendants are involved and one defendant answers, the question arises whether this terminates the period in which the plaintiff may amend without leave of court. Some federal courts have suggested that the plaintiff need obtain leave of court only with regard to those defendants who have answered.[31] One court found that obtaining leave of court was unnecessary to amend a complaint against defendants who had answered where the defendants were alleged to be jointly liable.[32]

Contrary to prior practice,[33] it is now "irrelevant that a proposed amendment changes the cause of action or the theory of the case, or that it states a claim arising out of a transaction different from that originally sued on, or that it cause[s] a change in parties."[34]

The rule mandates that leave to amend be freely given

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[30] *See id.* § 11-5-59 (defendant allowed 30 days to answer amendment made in vacation and a reasonable time if amendment made in term time or within 30 days of term time).

[31] *See, e.g.*, Westland Oil Dev. Corp. v. Summitt Transp. Co., 481 F. Supp. 15, 17 (S.D. Tex. 1979) (although one defendant filed responsive pleading, plaintiff not precluded from amending complaint as of course against defendants who have not filed responsive pleading), *aff'd per curiam*, 614 F.2d 768 (Temp. Emer. Ct. App. 1980); Goldlawr, Inc. v. Schubert, 169 F. Supp. 677, 689 (E.D. Pa. 1958) (same), *aff'd*, 276 F.2d 614 (3d Cir. 1960).

[32] Pallant v. Sinatra, 7 F.R.D. 293, 300 (S.D.N.Y. 1945). *See generally* 6 C. WRIGHT & A. MILLER, *supra* note 7, § 1481 (1971) (effect of rule 15(a) on multiple party situation).

[33] *See* V. GRIFFITH, *supra* note 9, § 389 (amendment must be germane to original bill and may not substitute a new cause of action).

[34] C. WRIGHT, *supra* note 6, § 66, at 311, *quoted in* MISS. R. CIV. P. 15 comment; *see also* Foman v. Davis, 371 U.S. 178, 182 (1962) (error to deny amendment stating an alternate theory of recovery); Gifford v. Wichita Falls & S. Ry., 224 F.2d 374, 377 (5th Cir.) (allowed amendment to substitute railroad company that acquired railway company), *cert. denied*, 350 U.S. 895 (1955); Jenn-Air Prods. Co. v. Penn Ventilator, Inc., 283 F. Supp. 591, 596 (E.D. Pa. 1968) (amendment to add cause of action for trade disparagement to patent infringement claim allowed), *rev'd and remanded on other grounds*, 464 F.2d 48 (3d Cir. 1972); Farrell v. Hollingsworth, 43 F.R.D. 362, 363 (D.S.C. 1968) (amendment to join abuse of process cause of action to a malicious prosecution claim held proper); Talley v. Piersen, 33 F.R.D. 2, 5 (E.D. Pa. 1963) (plaintiff permitted to amend to show correct driver where driver misidentified himself to police).

when justice so requires. Thus, leave to amend should be denied only if the opposing party would actually be prejudiced. The United States Supreme Court gave the following explanation for the purpose of rule 15(a):

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."[35]

Amendments of pleadings to conform to proof presented at trial were previously allowed by statute in Mississippi practice.[36] Rule 15(b) creates two procedures for dealing with this problem. Issues not raised by the pleadings but tried by the express or implied consent of the parties are treated as though they had been properly pleaded. The rule does not require that a conforming amendment be made nor is there a penalty for failure to do so. The careful attorney will amend, however, especially if it would be to his advantage that the record clearly show what was litigated at trial.[37]

The second procedure is used if an objection is made at trial. In such a case the court is instructed to allow freely an amendment to ensure presentation of the merits of the action if the opposing party cannot show that admission of the evidence would unduly prejudice him. Where undue prejudice exists, the court is empowered to grant a continuance in order that the party may meet the evidence. The last sentence of section (b), which is not found in the federal rules, is a reiteration of the mandate to courts that they should liberally grant permission to amend and makes abundantly clear the policy regarding amendment.

The previous Mississippi rule on the "relation back" of

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[35] Foman v. Davis, 371 U.S. 178, 182 (1962).

[36] MISS. CODE ANN. § 11-7-117 (1972); *see also* V. GRIFFITH, *supra* note 9, § 396 (amendment to make pleadings conform to evidence should be allowed at argument).

[37] *See* 5 C. WRIGHT & A. MILLER, *supra* note 7, § 1493 (noting that absence of amendment does not affect result of trial).

amendments provided that if the amended bill brought in no new parties and stated no new cause of action, it related back to the date of filing. A new party brought in by amendment was not affected by the suit until the amendment was filed, and any applicable statute of limitations continued to run as to the new party. This result applied to new causes of action as well.[38]

Rule 15(c) liberalizes this policy. If the claim or defense asserted in the amended pleading arises from the same transaction or occurrence that formed the basis for the original pleading, the amended pleading relates back to the date of the original pleading. The rule further provides that if the amendment changes the party against whom the claim is asserted, the amendment relates back if the claim is based on the same transaction or occurrence and, within the applicable statute of limitations, the party to be brought in received such notice of the commencement of the case as not to prejudice him, and knew or should have known that the suit would have been brought against him but for mistaken identity. Amendments to fill in the true names of fictitious parties under rule 9(h) relate back.

Rule 15(d) allows supplemental pleadings with leave of court upon reasonable notice and on terms the court determines to be just. This requirement to obtain leave of the court distinguishes 15(d) pleadings from the amendments of 15(a). The purpose of supplemental pleadings is to set forth transactions, occurrences, or events that have happened since the date of the original pleading. This does not differ significantly from prior practice.[39] Federal courts generally have held that supplemental pleadings relate back pursuant to 15(c), despite the absence of an express declaration in the rule to that effect.[40]

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[38] *See generally* V. GRIFFITH, *supra* note 9, § 398 (explanation of Mississippi rule).

[39] *See id.* § 412, at 403 n.18 (facts occurring after the filing of the original pleading are subject of a supplemental pleading).

[40] *See, e.g.*, Davis v. Piper Aircraft Corp., 615 F.2d 606, 609 & n.3 (4th Cir.) (supplemental pleading should ordinarily be given same relation back effect as an amended pleading), *cert. denied*, 448 U.S. 911 (1980); Security Ins. Co. v. United States *ex rel.* Haydis, 338 F.2d 444, 449 (9th Cir. 1964) (doctrine of relation back applied to supplemental pleading to prevent bar to action); Bates v. Western Elec., 420 F. Supp. 521, 526 (E.D. Pa. 1976) (supplemental complaint related back where an allegation of events occurring after filing of original complaint corrected a defective allegation of jurisdiction).

For a discussion of the relationship between subsections (c) and (d) of rule 15, see 3

VII. Rule 4—Process

Rule 4 substantially changes traditional Mississippi practice regarding process and its service. Under the new Rules, process will most frequently be served by use of certified mail. A threshold question is whether service by certified mail meets the constitutional requirement that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[41] This standard does not require actual notice, but rather a reasonable probability that actual notice will be given. Service by certified mail appears to meet the constitutional requirement.[42]

Summons is issued after filing of the complaint and the satisfaction of a costs deposit pursuant to rule 3. Unless the plaintiff requests otherwise, service will be by certified mail and in the form prescribed in official form 1A.[43] In cases involving multiple parties, the name of the first party on each side and the name and address of the person to be served is sufficient. Rule 4(a)(2) further requires a copy of the complaint to be served with the summons. This, in conjunction with the warnings in forms 1A and 1B, should impress upon the defendant the necessity of taking action and the consequences of failure to do so.

Rule 4(a)(3) defines "plaintiff" as any party seeking issuance and service of process and "defendant" as anyone upon whom it is sought to be served. These definitions attempt to avoid the confusion that arises when the defendant seeks service on a third party.

The provisions for waiver of service of summons in rule 4(a)(4) are consistent with prior practice as prescribed by section 13-3-71 of the Mississippi Code.

J. Moore, Moore's Federal Practice ¶ 15.16[2] (2d ed. 1980 & Supp. 1981-82); 6 C. Wright & A. Miller, *supra* note 7, §§ 1496, 1508 (1971 & Supp. 1980).

[41] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[42] *See* 4 C. Wright & A. Miller, *supra* note 7, § 1074, at 293-94, 294 n.97 (noting "unquestioned validity" of service by certified mail).

[43] It should be noted that the official form apparently does not include the address of the court or those of the parties as required by rule 4(a)(2). The requirements of the title of the court and the clerk's signature are in accord with current practice as set forth in Miss. Code Ann. § 13-3-3 (1972).

Section (b) provides four methods for service of process: (1) certified mail—return receipt requested; (2) delivery by process server; (3) residence service; and (4) service by publication. Unless a plaintiff requests otherwise in writing, service of process will be by certified mail.[44]

Subsection (b)(1)(B) deals with the mechanics of preparing and recording service by mail. The clerk should place copies of the summons and complaint in an envelope and address it to the person to be served, either at the address contained in the pleadings or at an address furnished in written instructions to the clerk. The envelope should be sent "Certified Mail: Return Receipt Requested." If the defendant is a natural person, the envelope should be marked "Restricted Delivery." The clerk should indicate on the docket both the date of mailing and the date the receipt is returned. Failure of delivery should likewise be noted on the docket and the clerk should notify the attorney of record by mail. Postage is charged to costs and the time for answering runs from the date of delivery as shown on the return receipt.[45]

Service by mail raises several problems, including delivery to one other than the addressee, refusal to accept, and inability to deliver. The comment to rule 4 states that "Restricted Delivery" means "the postal service is . . . required to deliver the summons only to the person to whom it is addressed." Postal regulations, however, allow a natural person to appoint an agent to accept restricted delivery mail.[46] An agent will probably be appointed to receive restricted delivery mail for large organizations or firms with post office box addresses. Attorneys should examine the return receipt to determine that the addressee did in fact accept delivery personally.

It can of course be argued that appointment by a natural person of an agent allows the agent to stand in the shoes of his principal and that therefore service on the agent is valid as to

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[44] MISS. R. CIV. P. 4(b)(1)(A).

[45] *Id.* 4(b)(1)(D)-(E).

[46] *See* UNITED STATES POSTAL SERVICE, DOMESTIC MAIL MANUAL § 933.1 (restricted delivery allows mailer to request that delivery be made to addressee or agent authorized by addressee to receive his mail); *id.* § 933.42a (addressee regularly receiving restricted delivery mail may authorize agent to receive mail).

the principal. It is also possible that such service would be reasonably calculated under the circumstances to give the requisite notice. Further, the rule employs a term that has a definition set by the Postal Service, so delivery within the definition of "Restricted Delivery" should be sufficient. Until the Mississippi Supreme Court rules on this issue, however, attorneys should exercise care in these situations and should ascertain whether an agent has been duly appointed by standing delivery order or letter as the postal regulations require.

A further problem is created by a postal regulation that permits parents or guardians to request receipt of restricted delivery mail for minors.[47] This appears to conflict with rule 4(c)(2), which mandates service upon the parent or guardian *and* the minor. Prior practice provided that service on a minor must be personal and that service upon the parent alone was insufficient.[48]

The problem of refusal to accept delivery of service of process by certified mail is dealt with by rule 4(d)(2). Upon refusal, the certified mail envelope will be returned with an endorsement showing refusal, and service is deemed complete when the refusal is entered of record. Service by mail basically substitutes the postman for the sheriff, but service is no less personal. Refusal, therefore, is the equivalent of forcibly preventing the sheriff from serving process[49] and is deemed a returned executed summons. The issue of refusal by an agent will probably turn on whether the agent was duly authorized to refuse service. The refusal of a parent or guardian to accept or allow acceptance by a minor would have an uncertain effect. In the absence of a ruling from the Mississippi Supreme Court, such a refusal should not be relied upon.

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[47] *Id.* § 933.43.

[48] *See, e.g.*, Carter v. Graves, 230 Miss. 463, 467, 470, 93 So. 2d 177, 179-80 (1957) (court lacked jurisdiction over infant because of improper service of process); Baldwin v. Thompson, 132 Miss. 125, 131-32, 95 So. 835, 835 (1923) (on suggestion of error) (service of process proper where each minor was personally served and father individually served); *see also* MISS. CODE ANN. § 13-3-43 (1972) (delineating proper method of service of process on infant).

[49] *See* MISS. CODE ANN. § 13-3-73 (1972) (allowing plaintiff to proceed against defendant where sheriff unable to serve process).

The third problem concerns unclaimed mail. Rule 4(d)(2) provides that failure to claim mail is not refusal and mail returned "unclaimed" does not represent completed service. The party seeking issuance in such a case must pursue another course or repeat service at another address.

Service may be delivered by a process server if requested in writing.[50] The process server must be the county sheriff or a person over eighteen years of age who is not a party and who has been designated by the court, upon the plaintiff's request, to serve the summons.[51] The request for service by process server should be made when the pleading requesting service is filed. The process server must first attempt personal service and, if successful, should endorse the fact of service on the summons and return it to the clerk to be recorded. The court may tax as costs the same amount allowable to the sheriff for service of process.[52] Service is complete on the date indicated by the process server's endorsement.

Residence service is available pursuant to subsection (b)(3)(A) upon written request or when the process server is unable to obtain personal service. Residence service involves leaving copies of the summons and complaint at the defendant's usual place of abode with the spouse or other family member above sixteen years of age who is willing to accept the copies.[53] The previous practice of posting a copy of the summons on the door of the defendant's home[54] is expressly abolished by the rule.

Service by publication is available if the residence of the defendant is unknown or if his residence is known but the other methods of service have failed. In each case an affidavit must be filed. If the residence is unknown, the affidavit must state the last known address, if any, and that service cannot be made because the residence is unknown and cannot be ascertained with

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[50] MISS. R. CIV. P. 4(b)(2)(A).

[51] This requirement for a court order at the plaintiff's request may have an effect on standing orders for use of professional process servers in some jurisdictions.

[52] *See* MISS. CODE ANN. § 25-7-19 (Supp. 1981) (sheriff's fees for serving process).

[53] The new rule tracks the requirements set forth in MISS. CODE ANN. § 13-3-33 (1972).

[54] *Id.*

reasonable diligence.[55] In the latter case, the plaintiff must state the last known address and the reasons that service cannot be made by certified mail, process server, or residence process.[56]

The notice is to be published once a week for three successive weeks in a paper of general circulation in the county where the complaint is filed. In a change from previous requirements,[57] the notice should include a summary statement of the object of the complaint and demand for relief. Additionally, there is no provision for posting the notice at the courthouse if there is no county newspaper. Rather, publication is to be made in a paper published in an adjoining county. Service is complete on the date of the last publication, and the publisher should file an affidavit with a copy of the notice of publication. Service by publication is also appropriate, using the same procedures, in cases involving unknown heirs or other unknown parties in interest.

A specific problem is raised when service by publication is used in quasi-in-rem actions. Under prior Mississippi practice, an affidavit was filed stating that the defendant was a nonresident, whereupon the clerk would publish a summons.[58] Rule 4(b)(5) appears to require at a minimum that, before service by publication can be utilized, an attempt must be made to serve process by certified mail. It is possible that the rule is broader and requires that attempts be made to serve process by certified mail, process server, *and* residence service before service by pub-

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[55] The United States Supreme Court has determined that due process requires that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

[56] This rule apparently grants in personam jurisdiction on the basis of publication in cases where certified mail, service by process server, and residence service have failed. It is doubtful that such a grant satisfies standards required by the Constitution. *See* Groves v. Witherspoon, 379 F. Supp. 52, 58-59 (E.D. Tenn. 1974) (service by publication under particular circumstances may be constitutionally deficient); Polansky v. Richardson, 351 F. Supp. 1066, 1069 (E.D.N.Y. 1972) (service of process by publication traditionally considered suspect); 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1074, at 297 (service by publication ordinarily inadequate in actions in personam). *But see* Milosavljevic v. Brooks, 55 F.R.D. 543, 549-50 (N.D. Ind. 1972) (motion to dismiss for lack of personal jurisdiction dismissed where defendant made more preferable methods of service impracticable).

[57] *See* MISS. CODE ANN. § 13-3-19 (1972) (method of service by publication delineated).

[58] *See id.* (summons by publication).

lication is available.

Rule 4(c) provides how service of summons, except service by publication, is to be made. The rule supersedes several statutes[59] but does not work any major changes in prior practice.[60]

Subsection (d) permits the court to exercise its discretion in allowing any summons to be amended upon just terms, provided that the substantial rights of the party served would not be materially prejudiced.

VIII. Rule 5—Service and Filing of Pleadings and Other Papers

Rule 5(a) gives a partial list of pleadings and papers that must be served upon each party to a lawsuit. The rule permits the court to order otherwise with respect to pleadings subsequent to the original complaint where there are numerous defendants, and with respect to the service of discovery papers.[61]

Service is accomplished by delivering or mailing a copy to the attorney representing the opposing party or to the party himself if the court orders. Unlike service of summons, service of these papers is complete upon mailing.

In cases involving numerous defendants, the court is allowed to relax the provisions of rule 7(a) and order that all cross-claims, counterclaims, or matters of avoidance or affirmative defenses contained in them be deemed denied or avoided. An attorney might wish to seek a partial order to compel the plaintiff to answer his counterclaim. This answer need not be served on the other parties.

Rule 5(d) represents a change from prior practice in that it allows papers subsequent to the complaint to be filed within a

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[59] For a listing of the statutes superseded by this rule, see Miss. R. Civ. P. 4 comment and *id.* app. B.

[60] A question raised by subsections (c)(11) and (12) involves county hospitals and similar institutions. It would appear that in addition to service upon the governing body of the institution as provided in subsection (13), service could also be made upon the officers of the county or municipality involved, broadening the scope of service in relation to these entities.

[61] Discovery papers include depositions upon oral examination and interrogatories, requests for documents, and requests for admissions.

reasonable time after service.[62] Pleadings that must be filed before they are served include not only the complaint but also other pleadings that state a claim for relief and which must be served with a summons.

Rule 5(d) recognizes the expense of filing papers and the commensurate inconvenience to the clerk by providing that, unless the court orders otherwise, papers produced in the course of discovery need not be filed until they are to be used with respect to any proceeding.

Although filing will ordinarily be done with the clerk, rule 5(e) enables the judge to receive papers for filing and to grant such orders as he deems proper.[63]

The rules of pleading and process in the Mississippi Rules of Civil Procedure appear to create a flexible, workable new civil procedure. Proper adherence to the letter and spirit of the Rules should streamline and simplify our court procedures.

James E. Merritt, Jr.

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[62] *See* Blank v. Bitker, 135 F.2d 962, 965 (7th Cir. 1943) (allowed answer to be filed three days late since rule 5(d) merely requires filing within a reasonable time after service).

[63] *See In re* President & Directors of Georgetown College, Inc., 331 F.2d 1001, 1001 n.2 (D.C. Cir.) (application for order for emergency blood transfusion properly filed with judge), *cert. denied*, 377 U.S. 978 (1964).

PRETRIAL MOTIONS UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE—RULES 12 and 56

*Robert L. Doyel**

Introduction

The Mississippi Rules of Civil Procedure use the term "motion" to describe any application to the court for an order.[1] Therefore, any document formerly called a "request," "application," "petition," or otherwise should now be captioned "motion to . . ." or "motion for . . ." if it seeks action by the judge. The terms "demurrer" and "plea" should not be used,[2] but if a motion is misnamed the court should impose no penalty but should treat the motion as though it had been correctly labeled.[3]

Unless a motion is made during a hearing or at trial, it must be in writing and must state with particularity both the relief requested and the grounds upon which the moving party feels that he is entitled to the relief.[4] Also, unless the motion is heard ex parte, it must contain or be accompanied by a notice of hearing and must be served upon the other parties at least five days before the hearing date.[5] The motion must also contain the certificate of the attorney for the moving party setting forth how, when, and upon whom the motion and notice were served.[6] Either before the motion is served or within a reasonable time after service, the motion, presumably the original, must be filed

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[1] Miss. R. Civ. P. 7(b). *See generally id.* 81(b)-(f) (applicability of Rules).

[2] *Id.* 7(c).

[3] *Id.* 1, 8(f), 7 comment.

[4] *Id.* 7(b).

[5] *Id.* 6(d). The moving attorney necessarily will obtain a hearing date from the judge or the clerk. Attorneys should also familiarize themselves with local rules implementing (or omitting) motion days under rule 78.

[6] *Id.* (5)(d); *see id.* form 22 (motion to dismiss).

with the court.[7]

I. Motions Allowed

The Mississippi Rules of Civil Procedure expressly authorize numerous pretrial motions.[8] Other motions not expressly described in the Rules may become necessary and will not be prohibited.[9] Perhaps the most important pretrial motion provisions

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[7] *Id.* (5)(d). The rules calculate most deadlines based upon service of documents rather than upon filing dates.

[8] *See, e.g., id.* 3 (either clerk or party may make motion for security of costs or motion to examine plaintiff filing pauper's affidavit); *id.* 5(c) (motion to limit service of pleadings on numerous defendants); *id.* 6(b), (d) (motions to enlarge or shorten time required for an act); *id.* 13(e) (motion to add recently matured or acquired counterclaim); *id.* 13(h) (motion to transfer case from county court because counterclaim exceeds court's monetary jurisdiction); *id.* 14(a) (motion to file third-party complaint more than 10 days after service of answer); *id.* 15(a) (motion for leave to amend pleading); *id.* 15(b) (motion to amend pleadings to conform to evidence or to permit introduction of evidence objected to as beyond scope of pleadings); *id.* 15(d) (motion for leave to file supplemental pleading); *id.* 16 (motion for pretrial conference); *id.* 20(b) (motion for separate trial); *id.* 21 (motion to add or to drop party or to sever claim); *id.* 24(c) (motion to intervene); *id.* 25 (motion to substitute party); *id.* 26(b)(3) (motion to disclose trial preparation materials); *id.* 26(b)(4) (motion to disclose expert witness information); *id.* 26(d)(motion for protective order); *id.* 27(b) (motion for deposition to perpetuate testimony pending appeal); *id.* 30(a) (motion to take deposition within 30 days after service of summons); *id.* 30(b)(3) (motion to enlarge or to shorten time for taking deposition); *id.* 30(b)(4) (motion to require deposition by stenographer); *id.* 30(d) (motion to terminate or to limit examination of deponent); *id.* 30(g) (motion to assess deposition expenses for failure to attend or to serve subpoenas); *id.* 31(a) (motion to enlarge or to shorten time for taking deposition upon written questions); *id.* 32(a)(3)(motions related to use of deposition at trial); *id.* 33(a) (motion for leave to serve in excess of 30 interrogatories); *id.* 34(b) (motions to enlarge or to shorten time for responses to requests for admissions and for determination of sufficiency of answer or of objection); *id.* 37 (motions to compel cooperation in discovery and to impose sanctions for failure to do so); *id.* 40(a)(2)(motion to place action on trial calendar); *id.* 41(b)(motion to dismiss for failure to prosecute or to comply with Rules or court order); *id.* 42(a) (motion to consolidate); *id.* 42(b) (motion for separate trial); *id.* 45(b)(1) (motion to quash, modify, or condition a subpoena duces tecum); *id.* 45(b)(3) (motion to enlarge or to shorten time for production under subpoena duces tecum); *id.* 45(b)(2) (motion to compel compliance with subpoena duces tecum to which objection has been made); *id.* 45(g) (motion to quash and to impose sanctions for abuse of subpoena power); *id.* 52(e) (motion to compel master to speed proceedings and to make report); *id.* 52(g)(2) (motion for court to act upon objections by a master); *id.* 55(b) (motion for default judgment); *id.* 55(c) (motion to set aside default or default judgment); *id.* 56 (motion for summary judgment); *id.* 65 (motion for temporary injunction or temporary restraining order and motion to dissolve or to modify temporary restraining order); *id.* 82(d) (motion to transfer due to improper venue).

[9] *Id.* 12 comment.

are found in rules 12 and 56. These motions address the lack of subject matter and personal jurisdiction,[10] the impropriety of venue,[11] the form and manner of service of process,[12] the failure to join an indispensable party,[13] the uncertainty or impropriety of language in a pleading,[14] and the sufficiency of the allegations or proof of a claim or defense.[15] Each of these motions will be discussed below.

A. Rule 12(b)(1)—Motion to Dismiss or to Transfer for Lack of Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction challenges the power of the court to hear the type of action involved in the lawsuit.[16] Unlike the federal courts, the Mississippi courts, as a system, have general jurisdiction. Therefore, unless the subject matter is one over which the federal courts have exclusive jurisdiction,[17] this motion should probably be a motion to transfer to the proper court. This type of motion was common to past Mississippi practice. Of course, the traditional, unchanged rule in Mississippi is that if a court that lacks subject matter jurisdiction mistakenly entertains a case, its lack of power to hear the case will not be an impediment to any judgment rendered.[18]

B. Rule 12(b)(2)—Motion to Dismiss for Lack of Personal Jurisdiction

A motion to dismiss for lack of personal jurisdiction challenges the court's power over a particular defendant and the

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[10] *Id.* 12 (b)(1)-(2).

[11] *Id.* 12(b)(3).

[12] *Id.* 12(b)(4)-(5).

[13] *Id.* 12(b)(7).

[14] *Id.* 12(e)-(f).

[15] *Id.* 12(b)(6), 12(c), 12(f), 56.

[16] 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (Supp. 1980).

[17] For example, the federal courts have exclusive jurisdiction in admiralty, bankruptcy, and patents while they retain concurrent jurisdiction with state courts in diversity and federal question cases. 28 U.S.C. §§ 1331-1361 (1976 & Supp. II 1978).

[18] MISS. CONST. art. VI, § 147.

claims against him. The movant, ordinarily a nonresident defendant, may assert that the Mississippi courts lack jurisdiction over him because he has not had sufficient contact with the state for the state courts constitutionally to adjudicate the claim against him[19] or, despite his contact with the state, because the long-arm statutes do not extend to service of process upon him.[20] Since rule 12 allows a defendant to join an attack on the court's personal jurisdiction with any other defense,[21] it is no longer necessary for a defendant to make a "special appearance." A motion to dismiss for lack of personal jurisdiction is appropriate, or the attack may be made in the answer.[22] The defendant may submit, and the court may consider, proof that is outside the pleadings.[23]

C. Rule 12(b)(3)—Motion to Transfer Because of Improper Venue

A motion to transfer because of improper venue is the same as it would have been before the new Rules were adopted. Rule 82 expressly precludes the dismissal of an action merely because of improper venue; rather, the court in which the action was originally filed must transfer the case to a court in which it properly could have been filed.[24]

D. Rules 12(b)(4) and 12(b)(5)—Motion to Quash Process or Service of Process

A motion to quash process under rule 12(b)(4) challenges the sufficiency of process, i.e., the form of the summons and complaint served upon the defendant.[25] A motion to quash ser-

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[19] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-20 (1945) (minimum contacts required for valid in personam jurisdiction).

[20] *See* Breeland v. Hide-A-Way Lake, Inc., 585 F.2d 716, 720 (5th Cir. 1978) ("doing business" provision of Mississippi long-arm statute not intended for use by nonresident plaintiff); Brown, *In Personam Jurisdiction Under Mississippi's Long Arm Statute*, 43 MISS. L.J. 1, 12 (1972) (same).

[21] MISS. R. CIV. P. 12(b).

[22] *Id.*

[23] Edwards v. Associated Press, 512 F.2d 258, 261 n.8 (5th Cir. 1975).

[24] MISS. R. CIV. P. 82(d).

[25] *See id.* 4(a)(1) (procedure for proper issuance).

vice of process under rule 12(b)(5) challenges the sufficiency of the method by which process was served.[26] A motion to quash for either of these reasons is essentially the same motion as that commonly used in prior practice. The remedy is also the same. A defendant who successfully urges the court to quash process or service of process is entitled only to a postponement of trial to the next term of court.[27]

E. Rules 12(b)(6), 12(c), 12(f), and 56—Motions Challenging the Sufficiency of Allegations or Proof of a Claim or Defense

The Rules provide at least three motions by which a party can obtain the trial court's scrutiny of the allegations in his opponent's pleadings.[28] The Rules also provide one motion by which a party can ask the court to examine the evidence before trial to determine the necessity of a full-fledged trial.[29] Since issues raised by these four motions are similar, it is useful to present a discussion of the four motions together for comparison purposes.

1. Rule 12(b)(6)—Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted

Rule 7(c) abolishes demurrers, pleas, and exceptions for insufficiency of pleadings. Rule 12(b)(6), however, authorizes the defendant's use of a motion to dismiss for "failure to state a claim upon which relief can be granted." This motion to dismiss is, in effect, a substitute for the demurrer and attacks the legal sufficiency of the plaintiff's allegations in the complaint.

The expression "failure to state a claim" must be read in the context of rule 2, which recognizes only one form of action known as a "civil action," and rule 8(a), which requires a pleader to include in his complaint "a short and plain statement of the

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[26] *See id.* 4(b) (procedure for proper service).

[27] MISS. CODE ANN. § 13-3-89 (Supp. 1981); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 240 (2d ed. 1950).

[28] The three motions are motion to dismiss, MISS. R. CIV. P. 12(b)(6), motion for judgment on the pleadings, *id.* 12(c), and motion to strike an insufficient defense, *id.* 12(f).

[29] *See id.* 56 (motion for summary judgment).

claim showing that the pleader is entitled to relief." The Advisory Committee's comments shed some light on what is required to "state a claim":

> The purpose of rule 8 is to give notice, not to state facts and narrow issues as was the purpose of pleadings in prior Mississippi practice. Consequently, the distinction between "ultimate facts" and "evidence" or conclusions of law is no longer important since the rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties.[30]

Furthermore, the Advisory Committee stated that the purpose of rule 2 is "to eliminate the term 'cause of action' from the lexicon of Mississippi civil practice." In other words, "the significance of the term 'cause of action,' which formerly was a matter of serious dispute, has been eliminated."[31]

The Rules require that the complaint contain only a short and plain statement of the claim;[32] they do not require that the complaint contain facts sufficient to constitute a cause of action as was required by prior practice.[33] Accordingly, a defendant who challenges the sufficiency of a complaint must make his attack on the basis of a failure to state a claim, not a failure to allege facts.

Unfortunately, the Rules do not provide guidelines for determining when a claim is sufficiently stated. The federal courts have wrestled repeatedly with this issue when reviewing motions to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure. The following test for stating a claim was adopted by the United States Supreme Court in *Conley v. Gibson*:[34]

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[35]

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[30] *Id.* 8 comment.
[31] *Id.* 2 comment.
[32] *Id.* 8(a).
[33] MISS. CODE ANN. §§ 11-5-13, 11-7-35 (1972).
[34] 355 U.S. 41 (1957).
[35] *Id.* at 45-46.

The United States Court of Appeals for the Fifth Circuit has stated emphatically that a motion to dismiss for failure to state a claim should not often be sustained:

> It reminds us of the need for periodic exercise, for over and over and over again—but apparently not often enough—this court has stated, explained, reiterated, stressed, rephrased, and emphasized one simple, long-established, well-publicized rule of Federal practice: a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim.[36]

One matter of concern is this: must the pleader allege every element of his cause of action? The Rules do not answer this question, although, as indicated above, the significance of the cause-of-action concept is diminished under the Rules. On the other hand, the Advisory Committee has indicated, "Although Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences and events which support the proffered claim."[37] The federal courts have frequently considered this issue, and it appears that, as a general rule, all the elements of a cause of action do not have to be pleaded as long as enough of the circumstances are pleaded to provide the defendant with reasonable notice of the nature of the claim.[38]

Since the new Rules introduce a new method of pleading into Mississippi practice, no "bright line" has yet been drawn between sufficient and insufficient allegations. The general requirements from *Conley v. Gibson*[39] and the approved forms,[40] however, make it quite clear that less detail is required under the Rules than was formerly required under fact pleading standards. Furthermore, rule 8(f) mandates a liberal construction of the complaint in favor of the plaintiff, contrary to prior

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[36] Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971).

[37] MISS. R. CIV. P. 8 comment.

[38] 5 C. WRIGHT & A. MILLER, *supra* note 16, § 1216 (1969).

[39] *See supra* notes 34-35 and accompanying text.

[40] MISS. R. CIV. P. forms 2-21.

practice.[41]

When the court reviews a motion to dismiss for failure to state a claim it may consider, in addition to the complaint, matters of public record, the record in the case, and exhibits attached to the complaint. The complaint must be construed in the light most favorable to the plaintiff, and the allegations therein must be taken as true.[42]

2. Rule 12(f)—Motion to Strike an Insufficient Defense

Rule 12(f) provides the plaintiff with a counterpart to the defendant's motion to dismiss. Whenever the defendant asserts more than one defense in his answer, it is appropriate for the plaintiff to move to strike any defense considered insufficient. It is quite difficult to give a definition to the expression "insufficient defense" because the sufficiency of particular allegations will depend upon both the nature of the claim and the nature of the defense.[43] If all of the defenses are insufficient, a motion for judgment on the pleadings is more desirable from the movant's point of view since a judgment is rendered when such motion is sustained.[44]

3. Rule 12(c)—Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is new to Mississippi practice and may be utilized by either the plaintiff or the defendant.[45] When the answer is entirely insufficient, this motion is as effective for the plaintiff as the rule 12(b)(6) motion to dismiss the complaint is for the defendant. In the event either of these two motions is sustained, the losing party is entitled to amend;[46] the failure to amend will make the order sustaining the motion a final judgment on the merits that may be appealed.[47]

As is the case with the rule 12(b)(6) motion to dismiss, the

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[41] *Id.* 8(f) and comment.
[42] 5 C. WRIGHT & A. MILLER, *supra* note 16, § 1357 (1969).
[43] *Id.* § 1381, at 791-92.
[44] MISS. R. CIV. P. 12(c) comment.
[45] *Id.* 12(c).
[46] *Id.* 12(b)-(c).
[47] *Id.* 12(b)-(c) and comment.

new Rules do not establish the standard for ruling on a motion for judgment on the pleadings. Also, there appears to be no Mississippi authority directly on this point. Accordingly, we should look to federal law for assistance.[48]

As a general rule, under federal law a moving party must clearly establish: (1) that no material issue of fact remains to be resolved; and (2) that he is entitled to judgment as a matter of law.[49] In deciding whether to sustain the motion, the trial court may consider the allegations in the pleadings and any facts of which the court takes judicial notice.[50] Furthermore, the court should view the facts alleged in the pleadings and all reasonable inferences to be drawn from them in the light most favorable to the non-moving party, taking the non-moving party's facts as true.[51] Rule 12(c), however, expressly states that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Therefore, the movant should be aware of the differences in these two motions.

4. Rule 56—Motion for Summary Judgment

Whenever either party believes that the undisputed facts demonstrate that he is entitled to a judgment, that party should move for summary judgment.[52] Summary judgments are new to Mississippi practice, but, unlike rule 12(b)(6) and 12(c) motions, rule 56 provides the court with a set of rules for determining when a motion for summary judgment should be sustained:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[53]

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[48] An excellent discussion is found in 5 C. WRIGHT & A. MILLER, *supra* note 16, §§ 1367-1372.

[49] Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254, 256 (5th Cir. 1973).

[50] J.M. Blythe Motor Lines Corp. v. Blalock, 310 F.2d 77, 78-79 (5th Cir. 1962).

[51] Williams v. Cessna Aircraft Corp., 376 F. Supp. 603, 607 (N.D. Miss. 1974).

[52] MISS. R. CIV. P. 56(a)-(b) and comment.

[53] *Id.* 56(c).

First, the rule spells out that the judge may consider: (1) pleadings; (2) depositions; (3) answers to interrogatories; (4) admissions; and (5) affidavits. Accordingly, because this motion deals not with the sufficiency of the pleadings but with the proof itself, any party seeking summary judgment should submit affidavits or should use some other method for bringing *evidence* before the court because this motion deals not with the sufficiency of the pleadings but with the proof itself.

Second, the rule expressly provides the test for the judge to apply: (1) There must be no genuine issue as to any material fact; and (2) the moving party must be entitled to judgment as a matter of law. In applying the test, one should recognize that it is not necessary for the court to find that there is *no* issue as to *any* fact; rather, it is only necessary for the court to find that there is no *genuine* issue as to any *material* fact. If the nonmoving party, by affidavit or otherwise, controverts any material fact, summary judgment should not be granted; the court, however, may render partial summary judgment, determining some but not all issues of fact.[54]

It should also be recognized that if a party moves for summary judgment with appropriate affidavits or other evidence in support of his version of the facts, the opposing party does not sufficiently controvert those facts by mere allegations or denials in his pleadings. The opposing party must respond by affidavits of his own or as otherwise provided by the rule, setting forth "specific facts showing that there is a genuine issue for trial."[55] This emphasis on issues of fact redefines the burden of proof so that the traditional burden of proof at trial is not the sole determinant. Rather, the burden is on the moving party to demonstrate that there are no genuine issues for trial.[56]

5. Rule 12(b)(7)—Motion to Dismiss for Failure to Join a Party Under Rule 19

Rule 19 provides a structure for the trial court to analyze a case when joinder of what was formerly called a necessary and

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[54] *Id.* 56(d).
[55] *Id.* 56(e).
[56] Adickes v. Kress & Co., 398 U.S. 144, 157 (1970).

indispensable party is not possible.[57] Although the language of the rule is copied from federal practice,[58] dismissal of an action under the circumstances described in the rule is consistent with former Mississippi procedure.[59]

6. Rule 12(e)—Motion for More Definite Statement

Under former practice, a motion for a more definite statement may have been called a motion to make more definite and certain; the new motion is essentially the same. While not stated in the new Rules, the Advisory Committee indicates that the bill of particulars has been abolished.[60] A motion for a more definite statement should be employed when an opposing party's pleading is so vague or ambiguous that a responsive pleading reasonably cannot be made.[61] Accordingly, the motion may not be used if a responsive pleading is not allowed.[62]

7. Rule 12(f)—Motion to Strike Redundant, Immaterial, Impertinent, or Scandalous Matter

Whether allegations should be stricken because they are redundant or immaterial is governed by a determination of prejudice to the opposing party; therefore, such motions should be denied unless prejudice is demonstrated.[63] Impertinent and scandalous matters may be stricken under this rule, and the attorney making such allegations will be subject to the sanctions of rule 11.[64]

II. When and How Defenses and Motions Are Asserted or Waived

Historically, if a person sought to challenge the personal ju-

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[57] Miss. R. Civ. P. 19 and comment.

[58] Fed. R. Civ. P. 19.

[59] Miss. R. Civ. P. 12(b)(7); *id.* 19 comment; *see* Comment, *Procedural Reform in Mississippi: A Current Analysis*, 47 Miss. L.J. 33, 58-59 (1976) (suit dismissed if necessary party cannot be joined).

[60] Miss. R. Civ. P. 12(e) and comment.

[61] *Id.*

[62] *Id.*; *see id.* 7(a) (recital of pleadings allowed).

[63] *Id.* 12 comment.

[64] *Id.* 11(b).

risdiction of the court, he had to enter a special appearance and could raise only the jurisdictional question; any other act by the defendant would have been deemed a general appearance and a submission to the in personam jurisdiction of the court.[65] A similar rule applied to objections to venue, form of process, and service of process.[66] Rule 12 institutes a new set of rules that eliminates the special appearance and makes it possible for a defendant to raise in personam jurisdiction, venue, form of process, and service of process issues in the answer or, at the option of the defendant, in a motion.[67] Rule 12 also introduces into Mississippi practice a new set of rules governing waiver of defenses.[68]

As set forth below, this writer believes that rule 12 contemplates that the defenses listed in rule 12(b)(2)-(5) will be waived if not asserted in a pre-answer motion or, if no pre-answer motion is filed, if not asserted in the answer itself. There is, however, a difference of opinion on this question. One knowledgeable observer has interpreted rule 12 to permit a defendant to file rule 12(b)(2)-(5) motions after the answer is filed even though he failed to file any rule 12 motion and failed to include available rule 12(b)(2)-(5) defenses in his answer.[69] The dispute arises out of the omission from Mississippi's rule 12 of the language "[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted" that is found in the

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[65] M. GREEN, BASIC CIVIL PROCEDURE 59-60 (1979); V. GRIFFITH, *supra* note 27, §§ 249-255.

[66] V. GRIFFITH, *supra* note 27, §§ 249-255.

[67] Rule 12(b) states:

> Every defense . . . shall be asserted in the responsive pleading . . . except that [the seven defenses enumerated in rule 12(b)(1)-(7), including lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process] may at the option of the pleader be made by motion . . . .
>
> No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

MISS. R. CIV. P. 12(b).

[68] *Id.* 12(g)-(h).

[69] Written materials prepared for presentation to the state's trial judges at a Mississippi Judicial College seminar on the new Rules state: "All defenses must be raised in the answer, except that the defenses listed in Rule 12(b) may be raised either in the answer or by a Rule 12 motion made before *or after* the answer." (emphasis in the original).

federal rule from which the state rule is drawn.[70] This writer has been unable to find any Advisory Committee record, or memory, that indicates that the omission of the quoted sentence was anything but an oversight. Furthermore, it seems against the policies of simplicity and economy of the Rules themselves to permit a post-answer motion to raise a question of personal jurisdiction or venue that was available to the defendant when he prepared his answer.[71] Accordingly, although a literal interpretation of the Rules may possibly allow post-answer rule 12(b)(2)-(5) motions, the present analysis will proceed on the thesis that no such motions are allowed.

It should be recognized that the new practice contemplated by rule 12 integrates rules dealing with the answer and rules prescribing pretrial motion procedure. Instead of requiring that defenses, such as challenges to the court's in personam jurisdiction, be presented in a pre-answer motion, rule 12 requires that *all* defenses be asserted in the answer, except for the seven defenses enumerated in rule 12(b), which may, at the option of the pleader, be asserted in a motion.[72] The service of any rule 12 motion stays the time for serving an answer.[73]

III. Timing of Defenses and Motions

A necessary interpretation of rule 12 is that if a defendant wants to employ either a motion for a more definite statement or any type of motion to strike, he must serve the motion before the answer is served.[74] Obviously, though, a motion to strike an insufficient defense is not a defendant's motion, and the plaintiff

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[70] *Compare* Fed. R. Civ. P. 12(b) *with* Miss. R. Civ. P. 12(b).

[71] Miss. R. Civ. P. 1 states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

[72] *Id.* 12(b). See rules 8 and 9 for other matters, including affirmative defenses, that under rule 12(b) may now be asserted in the answer in conjunction with rule 12(b) defenses.

[73] *Id.* 12(a).

[74] Rule 12(e) permits a motion for more definite statement only for the purpose of permitting the pleader to frame an answer and states expressly that the pleader "may move for a more definite statement *before* interposing his responsive pleading." *Id.* 12(e) (emphasis added). Rule 12(f) permits a motion to strike "*before* responding to a pleading" if a responsive pleading, such as the answer, is permitted. *Id.* 12(f) (emphasis added).

is in no position to evaluate the sufficiency of a defense until the defendant has served an answer. Accordingly, such a motion necessarily occurs only after the answer is served. Another motion that clearly cannot be utilized until after the answer is the motion for judgment on the pleadings.[75] The motion for summary judgment may be made by a defendant at any time and may be made by the plaintiff at any time after the expiration of thirty days from the commencement of the action.[76]

Of the motions and defenses discussed in this article, only those set forth in rule 12(b) present any real timing or waiver problem. As indicated above, any of these defenses may be set forth in the answer without fear of waiver.[77] Accordingly, if *no* rule 12 motion is employed, all rule 12(b) defenses may be asserted in the answer.[78] If *any* rule 12 motion is employed by the defendant, however, he risks waiver of some of the defenses listed in rule 12(b).[79] Thus, even if the pre-answer motion is a motion for a more definite statement or to strike, the making of such a motion triggers the waiver provisions of rule 12(g) and 12(h).

It is necessary to read both rule 12(g) and 12(h) carefully and together in order to synthesize the waiver provisions. Rule 12(g) simply precludes the use of *further motions* to raise defenses assertable in a motion, i.e., rule 12(b)(1)-(7) defenses, once any rule 12 motion has been made. Stated another way, rule 12(g) does not mandate the waiver of any defense not asserted; rather, it only prohibits the use of a motion for assertion of such defense if a rule 12 motion has already been employed and such defense then available was not included in the motion.

On the other hand, rule 12(h) specifies when certain defenses are waived:

1. If any rule 12 motion is made, the defenses of lack of

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[75] Rule 12(c) permits a party to move for judgment on the pleadings "after the pleadings are closed." *Id.* 12(c).

[76] *Id.* 56(a)-(c).

[77] *Id.* 12(b).

[78] *Id.* 12(b), (h)(1)(B).

[79] Rule 12(g), the first of two waiver subsections in rule 12, precludes further motions raising rule 12(b) defenses "[i]f a party makes *a motion under this rule*." *Id.* 12(g) (emphasis added).

personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process are forever waived if then available and not asserted in the motion.[80]

2. If no rule 12 motion is made and one of these four defenses is available but omitted from the answer, it is thereby waived.[81]
3. The defenses of failure to state a claim upon which relief can be granted and failure to join an indispensable party under rule 19 are not waived by failure to include them in a pre-answer motion, although they may not be asserted in a subsequent motion except a motion for judgment on the pleadings. If either defense is omitted from a motion, it may be asserted in any pleading or even at the trial on the merits.[82] The same rules apply to a motion to strike an insufficient defense.[83]
4. Simply stated, a defense of lack of subject matter jurisdiction is never waived.[84] It is, however, subject to the constitutional provision that upholds an action by a trial court when the action, though mistakenly brought in the wrong court, is prosecuted to judgment.[85]

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[80] *Id.* 12(h)(1)(A).
[81] *Id.* 12(h)(1)(B).
[82] *Id.* 12(g),(h)(2).
[83] *Id.* 12(h)(2).
[84] *Id.* 12(h)(3).
[85] MISS. CONST. art. VI, § 147.

JOINDER OF CLAIMS AND PARTIES—RULES 13, 14, 17, and 18

*James L. Robertson**

Introduction

Liberal joinder of parties and claims, at least at the pleadings stage, is a fundamental policy of the Mississippi Rules of Civil Procedure. The public's interest in judicial efficiency and the litigants' interest in the settlement of all related matters in a single action support this principle. Its limits are reached where the joinder would result in significant unfairness to the litigants.

Discarding form in favor of substance is another hallmark of the Rules. An action must be brought in the name of the real party in interest, not of some fictitious straw man. A desirable flexibility, previously unknown to Mississippi practice, has been introduced. In addition to a policy of liberal joinder at the pleadings stage, the Rules empower the trial judge to order severances when appropriate. No one can be hurt by liberal, even excessive joinder at the pleadings stage, but if a joined trial could result in substantial unfairness to any party, the court may sever as much of the case as appropriate.

At least ten rules, 13-14, 17-22, and 25-26, are required to implement the Rules' joinder policy. Parts of rule 8(e)(2) on joinder of claims and defenses and of rule 42(b) on severances also promote this policy. The present study covers only a portion of these rules—rules 13, 14, 17, and 18.

This article does not deal with "nuts and bolts"; it is concerned with the "what" and "why" of joinder of parties and claims. For the most part, "when" and "how" have been omitted, since time deadlines and procedures may be ascertained easily from the Rules themselves.

That the Mississippi Rules of Civil Procedure were pat-

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terned after the Federal Rules of Civil Procedure is no secret. Rules 13, 14, 17, and 18 are no exception.The federal rules have been in effect in substantially their present form since September 16, 1938. The federal experience is readily available and should be given great deference and respect. Judicial construction usually should follow the federal lead where the Mississippi rule and its federal counterpart use identical language. Respect for the law is hardly fostered by two different courts construing identical language to opposite results.

More pragmatically, Mississippi's lawyers have been deluged by rules. Few today can honestly say that they know all the procedural rules in force in all the courts in which they practice. In this context, the Mississippi rules are a welcome breath of fresh air. Not only do they hold the promise of rendering practice in the state's trial courts more uniform, but they also eliminate radical differences between federal and state practice.

There are, however, two reasons why some differences in interpretation must exist between the two sets of rules. First, there are numerous instances where the draftsmen of the Mississippi rules used differing language. Although, with a few limited exceptions, there have been no fundamental policy changes, specific verbiage differs from Mississippi rule to federal rule.

Second, there are several fundamental jurisdictional differences between the two systems. Mississippi still maintains separate law and equity courts, while the two were merged in the federal trial courts in 1938. Federal diversity of citizenship jurisdiction and ancilliary jurisdiction produce problems not encountered in state courts. In fact, many federal rules have been tailored to meet the exigencies of diversity jurisdiction and, therefore, are of no concern to Mississippi courts. All in all, these jurisdictional differences will produce inevitable tensions on the policy of uniformity advocated above.

I. Who May and Who Must Be Parties to an Action—Rule 17

A. The Real Party in Interest Test

Mississippi rule 17(a), with two unimportant exceptions, is identical to federal rule 17(a). It requires that every action be

prosecuted in the name of the real party in interest. Although rule 17 has been called unnecessary because it merely states the obvious, the rule is not redundant from a historical perspective. At common law, an action could be brought only in the name of the person who had legal title to the right invaded. A person with only a beneficial or equitable interest could not sue to protect that interest.[1] Rule 17(a) changes this practice.

Mississippi abrogated the common law rule by statute in 1916.[2] Under the statute, section 11-7-3, if an assignment of a chose in action was made in writing, the assignee was authorized to bring the suit in his own name.[3] The Mississippi Supreme Court has ruled that both claims for personal injuries[4] and contract rights[5] are assignable. Curiously, a subrogee has not been allowed to bring a suit in equity to enforce a right of subrogation.[6]

Rule 17(a) goes beyond the progressive step taken by section 11-7-3. Under the rule, all common law restrictions against a beneficial or equitable claimant's right to sue in his own name have been swept away, but beneficial or equitable owners are not the only persons who can be real parties in interst.[7] Executors, administrators, guardians, bailees, trustees,[8] and others[9] may be real parties in interest; they may bring actions in their representative capacity without joining the beneficiaries of the action. In short, the real party in interest is the person who, under sub-

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[1] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 70, at 330-31 (3rd ed. 1976) (history and criticism of rule 17(a)).

[2] Act of Apr. 7, 1916, ch. 134, 1916 Miss. Laws 193 (current version at MISS. CODE ANN. § 11-7-3 (1972)).

[3] MISS. CODE ANN. § 11-7-3 (1972).

[4] Farmer v. Humphreys County Memorial Hosp., 236 Miss. 35, 42-43, 109 So. 2d 356, 359-60 (1959).

[5] J.H. Leavenworth & Son v. Hunter, 150 Miss. 245, 267, 116 So. 593, 596 (1928).

[6] Box v. Early, 181 Miss. 19, 32, 178 So. 793, 795 (1938).

[7] *See* C. WRIGHT, *supra* note 1, at 330 (who may sue).

[8] The language of the federal rule is "trustee of an express trust." FED. R. CIV. P. 17(a). The official comment to Mississippi rule 17 gives no explanation of the deletion of the words "of an express trust" from the Mississippi version of rule 17(a). Common sense indicates that a broader meaning of "trustee" was intended.

[9] Others who may be real parties in interest include parties with whom or in whose name a contract has been made for the benefit of another, and parties authorized to bring actions on behalf of others. MISS. R. CIV. P. 17(a).

stantive law, possesses or is entitled to enforce the claim asserted.

The meaning and importance of the rule is perhaps best understood from the defendant's point of view. If he is going to be sued, he certainly wants the entire claim against him settled in one action.[10] If judgment is entered against the defendant, he is entitled to have all the claims of all the claimants merged in that judgment, and, if he wins, he expects all claims thereafter to be barred.[11]

B. Real Party in Interest under Federal Rule 17

The United States Supreme Court considered the real party in interest doctrine in *Navarro Savings Association v. Lee.*[12] The controversy involved the existence of diversity of citizenship between the parties.[13] The individual trustees of a business trust organized under Massachusetts law brought a breach of contract action against a Texas savings and loan association. The declaration of trust gave the trustees exclusive authority free from any power and control of the shareholders. If the beneficiaries were found to be real parties in interest, diversity would have been destroyed, since some of the beneficiaries were Texas citizens.[14] The Supreme Court ruled that, under the declaration of trust,

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[10] *Cf.* Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977) (paramount concern of judiciary is to prevent multiple suits where one suit suffices).

[11] *See* C. WRIGHT, *supra* note 1, at 331 (defendant's rights). Res judicata precludes relitigation of all claims that were or might have been asserted in the action. Pray v. Hewitt, 254 Miss. 20, 24, 179 So. 2d 842, 844 (1965). Rule 17(a) gives the defendant a means of assuring that he has been sued by the right plaintiff and that the final judgment will have res judicata effect. In the words of one critic, the rule does little more than enable a defendant to "insist upon a plaintiff who will afford him a setup providing good res judicata protection if the struggle is carried through on the merits to the end." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,* 81 HARV. L. REV. 356, 412 (1967); *see also* Smith v. Copiah County, 219 Miss. 633, 636, 69 So. 2d 404, 405 (1954) (assignee of one-half of claim against defendant cannot be substituted as plaintiff in dismissed suit brought by co-assignee).

[12] 446 U.S. 458 (1980).

[13] Mississippi's courts, of course, will not be concerned with diversity problems. This does not undermine the value of federal diversity cases like *Navarro.* The federal cases construe federal rule 17(a). In relevant part, the language of that rule is identical to Mississippi rule 17(a).

[14] 446 U.S. at 458.

the real parties in interest were the trustees,[15] the persons with the power and responsibility of enforcing the trust's claims.[16]

Mississippi's wrongful death statute was implicated when the federal district court faced a rule 17 problem in *Allen v. Baker*.[17] There, the deceased left four statutory beneficiaries. His mother and his sister were both Mississippians; one brother was a citizen of Missouri, and another brother was a citizen of California. By law, each of the beneficiaries was entitled to a one-fourth share of the proceeds of any recovery in the action.[18]

The action was brought in Mississippi by the Missouri brother. The defendant argued that because Mississippi law allowed any of the beneficiaries to bring the action,[19] all four were real parties in interest. Had all four been named as plaintiffs, diversity would have been destroyed.[20] The court rejected the defendant's argument and ruled that the Missouri brother was the real party in interest; he was authorized by statute to bring the action on behalf of the others. Once the Missouri brother prosecuted his action to a conclusion, the defendant had an iron-clad res judicata defense to a subsequent action by one of the other beneficiaries.[21] This defense is all that the defendant is entitled to under rule 17(a).

C. Interaction of Rules 17 and 19

Rule 19 might be thought to pose a problem in *Allen*. Since the mother, brother, and sister are parties with an interest in the subject matter of the suit, one can argue that they ought to be joined if feasible. Common sense suggests that these three are so situated that the disposition of the action may impede their ability to protect their interest.[22] Reading rule 17 with rule 19

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[15] *Id.* at 465-66.

[16] *Id.* at 459.

[17] 327 F. Supp. 706 (N.D. Miss. 1968); *see also* Mississippi *ex rel.* Derrow v. Durham, 444 F.2d 152, 153 n.2 (5th Cir. 1971) (diversity jurisdiction present although interested non-parties shared residence with defendant).

[18] 327 F. Supp. at 708.

[19] *Id.* (citing Miss. Code Ann. § 1453 (1942)) (current version at Miss. Code Ann. § 11-7-13 (Supp. 1981)) (wrongful death statute).

[20] 327 F. Supp. at 708.

[21] *Id.* at 709-11.

[22] Miss. R. Civ. P. 19(a)(2)(i).

may suggest that every action must be brought in the name of all parties with an interest in the matter. In *Allen*, this joinder would have destroyed diversity.

A correct reading of rule 17, however, presumes that the representative party will protect the interests of the beneficial claimants. Further, a representative party may sue without joining his beneficiaries. The mother, brother, and sister, therefore, need not be joined, and diversity is maintained.

While the answer is clear, it is not satisfactory. Rule 17(a) does not ensure that the representative claimant actually will protect the beneficial claimants. As a practical matter, there is no protection against the representative's good faith mistakes in litigation[23] or the defendant's res judiciata defense.[24] An amendment to the rule would be appropriate to remedy this shortcoming. Actual notice of the lawsuit to all beneficial claimants should be required. In other words, notice of the opportunity to intervene should be given to all persons who, were it not for rule 17(a), should be joined under rule 19.

D. Subrogation Cases

Rule 17(b) changes Mississippi practice; a subrogated insurer may no longer bring suit in the name of the insured. As an example, consider this common situation. Colliders Insurance Company has written a policy covering Hapless Harry's automobile. Harry is involved in a collision with Terry Tortious, and Colliders pays to have Harry's car repaired. Colliders later wants to recoup its losses by bringing an action against Terry. Colliders is subrogated to Harry's rights against Terry to the extent that it has paid Harry.

Under prior Mississippi practice, the action could be styled *Hapless Harry v. Terry Tortious*. Rule 17(b), however, provides

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[23] It is true that the guardian's handling of the claim is subject to chancery review. *See* MISS. CODE ANN. § 93-13-59 (1972) (order required for sale or compromise of minors' doubtful claims); *id.* § 93-13-77 (court examines final account); *cf. id.* § 93-13-211 (listing small transactions that may be performed without guardianships). The beneficiaries of an express trust also have theoretical remedies against the trustee. G. BOGERT & G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS §§ 154-158 (5th ed. 1973). There is, however, no action available for mistakes in trial strategy.

[24] *See supra* note 11 and accompanying text.

that if Colliders has acquired Harry's entire claim, the named plaintiff must be Colliders Insurance Company. Rule 17(b) applies whether the claim was acquired by operation of law, by assignment, by loan receipt,[25] or otherwise. If, however, Harry retains any interest in the matter, for example, a deductible claim, the action must be brought in the names of both the subrogor, Harry, and the subrogee, Colliders.

Rule 17(b) operates notwithstanding the language of insurance policies. Automobile liability insurance policies commonly provide that if the insurer makes the sort of payment described above, it will have the right to bring a subrogation action in the name of the insured. Insurers consider this a valuable right, one designed to shield insurance companies from jury prejudice.[26] Rule 17(b) has removed this tactical advantage.

Rule 17(b) makes Mississippi practice consistent with federal practice. In federal court, if the insurer has paid the entire claim, it must sue in its own name. It is the only real party in interest;[27] an insured who has been paid in full and has executed a final release no longer has any cognizable interest in the claim.

Assume further that Hapless Harry suffered personal injuries in the accident. He may personally bring suit against Terry Tortious, claiming both personal injuries and property damage. Terry may invoke rule 17(b) and object to the failure to join Colliders as co-plaintiff.[28] In addition, Colliders may intervene under rule 24(a) to protect its interest in the property damage claim.[29]

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[25] Miss. R. Civ. P. 17(b). Loan receipts are advances made by the insurer to the insured before the insurer is obligated to pay the claim. The insurer is then subrogated to the rights of the insured. *See* Luckenback v. W.J. McCahan Sugar Ref. Co., 248 U.S. 139, 147-48 (1918) (explanation of loan receipt device). In *Luckenback*, Mr. Justice Brandeis noted that the loan receipt "is creditable to the ingenuity of businessmen that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice." *Id.* at 149. Times have changed. Rule 17(b), no doubt perceiving the loan receipt as an ingenious device for concealing from the court and jury the fact that an insurer will profit if the action is prosecuted successfully, strips away the insurer's mask, as though the identity of a claim of right ought somehow turn on the identity and public popularity of the holder of that right.

[26] *See* Miss. R. Civ. P. 17(a) comment.

[27] United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949).

[28] Cross v. Harrington, 294 F. Supp. 1340, 1342 (N.D. Miss. 1969).

[29] *See, e.g.*, McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1071 (5th Cir. 1970) (inter-

E. Effect of Failure to Sue in the Name of the Real Party in Interest

Previously, an action not brought in the name of the real party in interest was subject to dismissal.[30] Rule 17(a), however, provides that before an action may be dismissed, a reasonable time must be allowed for joinder or substitution of parties or ratification by the real party in interest. Therefore, a defendant who objects under rule 17(a) merely ensures that a final judgment will afford him the maximum res judicata protection allowable.

F. Capacity

The legal concepts of real party in interest and capacity to sue or be sued must not be confused. The person entitled to assert the claim is the real party in interest. That person may, however, be under a legal disability and thus lack capacity to sue. Furthermore, if he has alienated his rights to the claim, he is not a real party in interest,[31] even if he is under no legal disability and has capacity to sue or be sued.

Rule 17(c) addresses the issue of capacity.[32] Whenever a party is under a legal disability, the action may be maintained by any duly appointed representative. Rule 17(c) provides that a minor or incompetent person who does not have a court-appointed representative may sue by his next friend. The court may appoint a guardian ad litem if the party does not have a representative. Rule 17(d) provides that an attorney must be appointed guardian ad litem and that the guardian ad litem's fees may be taxed as costs.

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vention by insurance company to protect subrogation rights; intervention of right under rule 24(a)(2)); Smith Petro. Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1115 (5th Cir. 1970) (same).

[30] *See, e.g.*, Gagliano *ex rel.* Gagliano v. Bernsen, 243 F.2d 880, 882 (5th Cir. 1957) (action not brought by real party in interest dismissed).

[31] *See* C. WRIGHT, *supra* note 1, at 332 (distinction between real party in interest and capacity).

[32] Rule 9(a) requires that capacity to sue be stated in the initial pleading. MISS. R. CIV. P. 9(a). The Mississippi rule departs from federal rule 9(a), which does not require a statement of capacity to sue or be sued. FED. R. CIV. P. 9(a).

G. *Public Officials as Parties*

Rule 17(e) provides that a public official's title, rather than his name, may be used in the pleadings.[33] This rule should prove helpful to plaintiffs, since on occasion a plaintiff may not know the defendant's name, but only his office. On other occasions, the plaintiff may wish to emphasize that he is suing the defendant only in his official capacity.[34] The court may, in its discretion, require that the official's name be added to the parties.

II. Liberal Joinder of Claims—Rule 18

"Under the Rules, the impulse is toward the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[35] In promoting this policy, rule 18 allows a party to join in a single action as many claims as he has against an opposing party. Joinder of claims is limited only by rule 20(a)'s restrictions on joinder of parties.[36]

A. *Joinder of Unrelated Claims Against the Same Defendant*

Two claims that are legally similar but factually distinct may be joined in the same action. If, for example, the plaintiff holds two unrelated promissory notes from the defendant, and both are overdue, he has two claims against the defendant. Under rule 18, he can join the two claims in a single action.

In addition, a plaintiff may join a contract claim and an unrelated tort claim. For example, a plaintiff may sue a defendant

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[33] Miss. R. Civ. P. 17(e) comment.

[34] When governmental officers or employees act in discharge of duties imposed by law they may, absent some immunity defense, be sued in their official capacity and not individually. Cole v. Tuttle, 366 F. Supp. 1252, 1254 (N.D. Miss. 1973).

Rule 17(e) was lifted from federal rule 25(d)(2). As the official comment notes, since the rule "pertains more to capacities and interests of parties than to substitution of parties, it was moved to rule 17." Miss. R. Civ. P. 17(e) comment.

[35] United Mine Workers v. Gibbs, 383 U.S. 716, 724 (1966).

[36] Miss. R. Civ. P. 20(a) allows parties to be joined in one action if they assert or have asserted against them a claim arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all the persons will arise in the action.

on an open account and join with that claim a negligence action arising from an automobile accident.[37]

Traditionally, contract and tort claims could not be joined.[38] In 1974, the Mississippi legislature removed this restriction.[39] Rule 18 expands the liberal joinder policy approved by the legislature; so long as the claims are against the same opposing party, neither a legal nor a factual nexus is required.

The plaintiff may also join several legally distinct claims based on the same facts. For example, in a products liability action, the plaintiff may file a three-count complaint.[40] The first count may allege negligence, the second may be contractual in nature and claim breach of warranty, and the third may plead strict liability under section 402A of the Second Restatement of Torts.[41]

Alternative claims may also be alleged in a single complaint. For example, a plaintiff may sue defendant for slander and may also sue under the actionable words statute. These claims may be joined in a single action, even though the elements of proof are not the same. Rule 18 does not change Mississippi practice in this situation. For example, a two-count complaint, one charging actionable words and the other alleging malicious prosecution, was allowed fifty years ago.[42] Other similar two-count com-

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[37] Joinder at the pleadings stage is allowed under rule 8(e)(2) and rule 18(a). Rule 42(b) allows a court to order separate trials of claims in order to avoid prejudice or inconvenience. The court would almost certainly order separate trials in the example given.

[38] Delta Constr. Co. v. City of Jackson, 198 So. 2d 592, 598 (Miss. 1967); Nasif v. Booth, 221 Miss. 126, 135, 72 So. 2d 440, 442 (1954).

[39] Act of Mar. 5, 1974, ch. 315, 1974 Miss. Laws 355 (codified at MISS. CODE ANN. § 11-7-36 (Supp. 1981)); *see* Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975) (contract and tort action allowed in same suit).

[40] More correctly, these are all one claim, one set of actions or defaults by the product manufacturer and one aggregate of damages suffered by plaintiff. Thus, although three separate legal theories of liability have been alleged, there is only one claim for res judicata and for statute of limitations purposes.

[41] RESTATEMENT (SECOND) OF TORTS § 402A (1963-1964). A claim for damages on tort grounds without fault has never been considered antagonistic to or inconsistent with a negligence claim. "The negligence charge is simply an enlargement of the charge of damage without negligence. Negligent damage is more comprehensive than damage without negligence." City of Jackson v. Cook, 214 Miss. 201, 208-09, 58 So. 2d 498, 500-01 (1952).

[42] Shirley v. Garis, 159 Miss. 1, 3-4, 131 So. 366, 366 (1930).

plaints have proceeded without reported objection.[43]

B. Claims Against Multiple Defendants

As long as there are only two parties to the lawsuit, multiple claims need not arise out of common facts to be joined. The problem becomes more complex, however, when there are multiple parties. Under rule 20(a) a single plaintiff may sue multiple defendants only if the claims against each defendant arise out of the same facts and present common questions of law or fact.[44] Of course, once the defendants are joined, rule 18(a) will allow joinder of any other claims against the defendants.[45] Rule 20(a) applies in the same way to multiple plaintiffs who sue multiple defendants.

C. Conclusion

Rule 18 enlarges on the maxim that "equity delights to do complete justice and not by halves."[46] Under this maxim, equity has always allowed the plaintiff to assert unrelated claims against a single defendant.[47] When, however, the plaintiff sought to join separate and unrelated claims against defendants who did not have a community of interests among them, a demurrer for multifariousness would be sustained.[48] Rule 18 makes it clear that equity may do complete justice, even though unrelated claims are asserted. Rule 20(a) provides that defendants may be joined in certain circumstances.[49] Thus, "multifariousness" has been eliminated from the vocabulary. The former restrictions on multiple claims against multiple defendants have been relaxed, at least at the pleadings stage.

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[43] *E.g.*, Salvo v. Edens, 237 Miss. 734, 737-38, 116 So. 2d 220, 220-21 (1959) (libel and actionable words); Huckabee v. Nash, 182 Miss. 754, 758, 183 So. 500, 501 (1938) (assault and actionable words).

[44] Hynd v. McGraw, 11 F.R.D. 82, 82-83 (S.D.N.Y. 1950).

[45] Kedra v. City of Philadelphia, 454 F. Supp. 652, 661 n.6 (E.D. Pa. 1978).

[46] V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 36 (2d ed. 1950).

[47] Henry v. Henderson, 79 Miss. 452, 454-55, 30 So. 754, 755 (1901); MISS. CODE ANN. § 11-5-63 (1972).

[48] Carter v. Kimbrough, 122 Miss. 543, 555-56, 84 So. 251, 256 (1920).

[49] *See supra* note 44 and acompanying text.

III. COUNTERCLAIMS—RULE 13

The Rules have substantially changed Mississippi practice regarding counterclaims. Counterclaims that were previously permissive[50] are now compulsory.[51] Many other of a defendant's claims against a plaintiff, which could not be asserted under former practice, are now permissive counterclaims.[52]

A. Compulsory Counterclaims

Under former practice, if a defendant had a claim arising out of the same facts and circumstances as the plaintiff's suit, the defendant was allowed to assert his claim, but he was not compelled to do so.[53] Under the Rules, any claim that the defendant has against the plaintiff arising out of the same transaction or occurrence as the plaintiff's original claim is a compulsory counterclaim.

The label "compulsory" indicates that the defendant is somehow compelled to assert his claim. The term is misleading; a defendant is not required to file a compulsory counterclaim. He is not fined, imprisoned, or held in contempt if he fails to assert the claim. The rule implies, however, that if a compulsory counterclaim is not asserted, the claim cannot be brought later as a separate action.[54] If a compulsory counterclaim is not as-

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[50] Counterclaims, which were considered permissive, could be asserted. No penalty, however, was incurred by a defendant who neglected to do so. MISS. CODE ANN. § 11-7-69 (1972).

[51] MISS. R. CIV. P. 13(a).

[52] *Id.* 13(b).

[53] In circuit court, if the counterclaim arose out of the same situation, occasion, transaction, contract, or subject matter as the plaintiff's claim, it could be asserted. MISS. CODE ANN. § 11-7-69 (1972); *cf.* General Motors Acceptance Corp. v. Fairley, 359 So. 2d 1386, 1387-88 (Miss. 1978) (counterclaim to set off or establish unrelated debts or damages not allowed in replevin action); Carruth v. Easterling, 247 Miss. 364, 376-77, 150 So. 2d 852, 858 (1963) (same).

Under the former chancery practice, the defendant was allowed to file a cross-bill against the complainant, if he wished to do so, asserting matters that were "germane" to the original bill of complaint. MISS. CODE ANN. § 11-5-37 (1972); Humble Oil & Refining Co. v. Rankin, 207 Miss. 402, 410-14, 42 So. 2d 414, 416-18 (1949).

[54] "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." MISS. R. CIV. P. 13(a).

serted in the original action, it is thereafter barred.[55]

B. *Phoenix Insurance Co. v. Haney*

In 1959, the Mississippi Supreme Court decided *Phoenix Insurance Co. v. Haney*.[56] The decision is instructive because it is erroneous. Phoneix had insured Haney's building and its contents. Both were totally destroyed in a fire.

Phoenix brought a declaratory judgment action in the United States District Court for the Northern District of Mississippi.[57] Phoenix asked the court to declare that it owed nothing under the policy by reason of the insured's failure to comply with certain terms of the policy. The district court ruled in favor of Phoenix on the contents issue. It found that Phoenix owed Haney nothing for the loss of the building's contents. Otherwise, the complaint was dismissed with prejudice.[58] Phoenix lost on its claim for a declaration that it owed nothing under the building's coverage.

Haney had not asserted a counterclaim against Phoenix for the loss of the building and its contents, even though such a counterclaim would have been proper.[59] If the counterclaim had been asserted, the logic underlying the court's final judgment suggests that it would necessarily have found Phoenix liable for

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[55] Some courts, in distinguishing between compulsory and permissive counterclaims, have asked whether the counterclaim would be barred by res judicata if there were no compulsory counterclaim rule. C. WRIGHT, *supra* note 1, § 79, at 389; *see, e.g.*, Beach v. KDI Corp., 490 F.2d 1312, 1321 n.16 (3d Cir. 1974) (counterclaim not compulsory because disposition of claim in plaintiffs' favor would not have bound defendants in res judicata sense).

While the res judicata explanation may be helpful, there is no need to go beyond a simple understanding of the rule to understand the preclusive effect of the failure to assert the compulsory counterclaim. The rule requires that the counterclaim be asserted in the original action if it is to be asserted at all. Where the defendant neglects to assert his claim, and where the matter receives final adjudication, the later assertion of the counterclaim in a separate action is precluded by the rule.

[56] 235 Miss. 60, 108 So. 2d 227 (1959), *noted in* 73 HARV. L. REV. 1410, 1410-14 (1960).

[57] 235 Miss. at 65, 108 So. 2d at 228.

[58] *Id.* at 65-66, 108 So. 2d at 228.

[59] At the time, Haney held a matured claim against the company for the proceeds of the insurance policy by reason of fire losses to the building and its contents. That claim arose out of the same transaction and occurrence as the insurance company's declaratory judgment claim. *Id.*, 108 So. 2d at 228.

the loss of the building.

After the federal court judgement became final, Haney filed an action against Phoenix on its coverage of the building. The suit was brought in the Circuit Court of Monroe County. In its defense, Phoenix asserted that Haney's claim was a compulsory counterclaim; Haney should have brought it in the declaratory judgment action, and his failure to do so precluded him from bringing suit. The Mississippi Supreme Court erroneously held that federal rule 13(a) did not preclude Haney from bringing suit, that he could maintain his action in state court, and that he should recover from Phoenix for the loss of his building.[60]

The *Haney* decision is wrong. It ignores the clear language and controlling effect of federal rule 13(a). It likewise ignores the strong policy underlying the rule that all claims arising out of the same transaction or occurrence be determined in a single action. The district court had in personam jurisdiction over both Phoenix and Haney, and it had subject matter jurisdiction over the controversy. The federal rules required that Haney assert his counterclaim in that action, but he failed to do so. Under the federal rules, he was barred from later asserting his claim.[61]

The same situation could occur under the new Mississippi rules. Assume that Phoenix files its declaratory judgment action in the Circuit Court of Monroe County, as it may under rule 57,[62] and the court rules against Phoenix. When Haney files his separate action on the building's loss, a correct reading of rule 13(a) would preclude the action. It is irrelevant that the logical inference from the declaratory judgment action is that Haney could have won on his counterclaim had he asserted it in a timely manner.

The policy of rule 13(a) is to promote the settlement in a single action of all disputes arising out of the same transaction

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[60] *Id.* at 66-73, 108 So. 2d at 228-32.

[61] For a decision that comes much closer than does *Haney* to understanding how state courts ought to deal with prior federal court adjudications, see Horne v. Woolever, 170 Ohio St. 178, 163 N.E.2d 378, 382-83 (1959) (defendant's failure to assert compulsory counterclaim in federal action barred claim in later state court action).

[62] MISS. R. CIV. P. 57 allows Mississippi courts of record to declare rights, status, and other legal relations where such a judgment would terminate the controversy or remove an uncertainty.

or occurrence.[63] The rule should be enforced according to its tenor.

C. *The Same Transaction or Occurrence*

"The same transaction or occurrence" is the lynchpin of the compulsory counterclaim rule;[64] a counterclaim is compulsory if it arises out of the same transaction or occurrence as the plaintiff's original claim. But how does one know whether the counterclaim arises out of the same transaction or occurrence as the original claim? The question is more easily put than answered.

Many contend that it is the same transaction or occurrence if the same evidence or witnesses are relevant to both claims.[65] A simple example is an automobile accident in which the plaintiff alleges that the defendant was negligent and in which the defendant has a claim for damages predicated upon the plaintiff's own negligence. Presumably, the witnesses and evidence, at least on the liability issues, would be identical for the two claims. This would clearly be a compulsory counterclaim. Under rule 13(a), if the same evidence will support or refute both the plaintiff's claim and the counterclaim, the counterclaim is compulsory. While this test is helpful, it is not always conclusive.

Another test is whether the issues of law and fact in the counterclaim are largely the same as those in the plaintiff's claim. This test was derived from *Moore v. New York Cotton Exchange*,[66] which was decided long before there was a rule 13(a). The "same issues of law and fact test" has generally been considered inadequate.[67] Where the same issues of law and fact

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[63] Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977).

[64] A counterclaim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim is compulsory and rule 13(a) controls; however, a counterclaim arising out of a separate transaction or occurrence is permissive and is governed by rule 13(b). 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1409, at 36-37 (1971).

[65] *See, e.g.*, Cannizzario v. Bache, Halsey Stuart Sheilds, Inc., 81 F.R.D. 719, 722 (E.D. Pa. 1979) (counterclaim compulsory when substantially same evidence used to resolve issues raised by complaint and counterclaim); Non-Ferrous Metals, Inc. v. Saramar Aluminum Co., 25 F.R.D. 102, 105-06 (N.D. Ohio 1960) (if same evidence supports or refutes opposing claims, then counterclaim arose out of same transaction or occurrence).

[66] 270 U.S. 593, 610 (1926).

[67] The same issues test is unsound largely because it is not possible for the plaintiff

are involved in both claims, there is no doubt that the claim is compulsory. The problem is that where the converse is true, where the counterclaim does not involve the other side of the same issues of law or fact, it does not necessarily follow that the counterclaim should not be held compulsory.

A third test is whether, if the counterclaim were asserted in a later lawsuit, it would be barred by res judicata. This test, too, has been considered inadequate. Res judicata generally does not preclude claims that a defendant failed to assert against a plaintiff; on the contrary, res judicata generally bars only claims that the plaintiff failed to assert against the defendant.[68]

The fourth possible test encompasses a principle familiar in federal jurisdiction cases, the "common nucleus of operative fact." A state claim may lie within the pendent jurisdiction of the federal court if it and the federal claim to which it is appended derive from a common nucleus of operative fact. *United Mine Workers v. Gibbs*[69] suggests that this test is equivalent to the same transaction or occurrence requirement.[70] Unfortunately, showing the similarity between common nucleus of operative facts and same transaction or occurrence merely compares two equally hazy concepts. The fundamental inquiry in each test is whether the two claims involved are sufficiently intertwined that a rational person would ordinarily expect to have the entire matter settled in one judicial proceeding.[71]

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to determine the issues adequately until a reply has been made to the counterclaim or a pretrial conference has been held. Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading,* 38 MINN. L. REV. 423, 438 (1954).

[68] Absent a compulsory counterclaim rule, a pleader is never barred by res judicata from suing independently on a claim that he refrained from pleading as a counterclaim in a prior action. RESTATEMENT OF JUDGMENTS § 58 (1942); *cf.* 6 C. WRIGHT & A. MILLER, *supra* note 64, § 1410, at 195 (another weakness is that res judicata doctrine is subject to variable state laws).

[69] 383 U.S. 715 (1966).

[70] *Id.* at 725 n.13. In a footnote explaining the pendent jurisdiction test, the *Gibbs* Court notes: "While it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of federal courts, they do embody 'the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time.'" *Id.*

Aside from the doctrine of res judicata, only federal rule 13(a) requires any litigant to assert a claim. Thus, the *Gibbs* Court must be referring to rule 13(a).

[71] *See* Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977) (plaintiff should be spared rigors of more than one action).

The search for a precise line of demarcation between the compulsory counterclaim and the permissive counterclaim has continued past the several tests mentioned above and will no doubt continue in the future. No completely satisfactory answer has yet been found. Nevertheless, the dominant view seems to be that a counterclaim arises out of the same transaction or occurrence as the original claim if there is a "logical relationship" between the two.[72] This test certainly includes all of those counterclaims that are compulsory under the same evidence test and the same issues of law and fact test, and it may include more.

Consider, for example, a libel claim and an assault and battery counterclaim. Plaintiff feels aggrieved by an article published by the defendant newspaper editor. He goes to the office of the newspaper and punches the editor in the nose. Plaintiff then brings his libel action against the newspaper editor. Must the editor assert his counterclaim in that action? Is there a logical relationship between the claim for libel and the claim for assault and battery? Clearly there is, even though different issues of law and fact may be involved and even though different witnesses and evidence will support or refute the two claims.[73]

In the interest of resolving all aspects of a brouhaha in a single civil action, rule 13(a) requires that the defendant assert his claims then and there or forever hold his peace.[74]

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[72] *E.g.*, United States v. Aquavella, 615 F.2d 12, 22 (2d Cir. 1979) (counterclaim logically related to plaintiff's claim held compulsory); Wolfson v. Artisans Sav. Bank, 83 F.R.D. 552, 555 (D. Del. 1979) (counterclaim not logically related to claim held not compulsory); Magna Pictures Corp. v. Paramount Pictures Corp., 265 F. Supp. 144, 153 (C.D. Cal. 1967) (claim and counterclaim arising out of same transaction held logically related); G. & M. Tire, Inc. v. Dunlop Tire & Rubber Corp., 36 F.R.D. 440, 441 (N.D. Miss. 1964) (counterclaim arising from same course of dealing as claim held logically related and compulsory).

[73] *See* 6 C. WRIGHT & A. MILLER, *supra* note 64, § 1410, at 47 (claims not meeting same evidence test may satisfy logical relation test). *But see* Williams v. Robinson, 1 F.R.D. 211, 213 (D.D.C. 1940) (claim that could have met logical relation test held not compulsory counterclaim since same evidence test not met).

[74] Again, we are talking about assertion of claims at the pleadings stage. Severance for trial is always available where appropriate. MISS. R. CIV. P. 13(j), 42(b).

D. Other Applications of the Same Transaction or Occurrence Test

Several rules use the phrase "transaction or occurrence." It is important to consider whether the meaning may differ from rule to rule. For example, both rule 13(a), regarding compulsory counterclaims, and rule 13(g), permitting the filing of cross-claims use the "transaction or occurrence" phraseology.[75] In addition, the phrase appears twice in rule 14, which concerns third-party claims.[76] Rule 15's relation-back doctrine allows amendments to pleadings if a claim arises out of the same "conduct, transaction, or occurrence" as did the original pleading.[77] Rule 20 authorizes permissive joinder of plaintiffs or defendants if their rights arise "out of the same transaction, occurrence, or series of transactions or occurrences."[78] Finally, rule 24 shortens the term to "transaction;" it allows a party to intervene only if he claims an interest relating to the transaction that is the subject of the pending action.[79]

Do these terms have the same meaning each time they are used in the Rules? Can "transaction or occurrence" ever be anything other than an inadequately descriptive label? Would that which is called a transaction or occurrence by any other name smell as sweet?[80] Does the use of two words convey a meaning that could not be conveyed as well by one? Or is all of this

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[75] If a counterclaim "arises out of the same transaction or occurrence that is the subject matter" of the plaintiff's claim, it is a compulsory counterclaim. MISS. R. CIV. P. 13(a). If a cross-claim arises "out of the transaction or occurrence that is the subject matter" of the plaintiff's original claim, it is a permissive cross-claim. *Id.* 13(g). *See* American Sur. Co. v. Fazel, 20 F.R.D. 110, 111 (D.C. Iowa 1956) (cross-claim not originally asserted, separate action allowed); Hoosier Casualty Co. v. Fox, 102 F. Supp. 214, 226-28 (D.C. Iowa 1952) (cross-claim asserted, separate action allowed).

[76] MISS. R. CIV. P. 14(a). The pertinent language is as follows:

> The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff . . . .

Id.

[77] *Id.* 15(c).

[78] *Id.* 20.

[79] *Id.* 24(a).

[80] *Cf.* Romeo and Juliet, Act II, scene i, lines 85-86.

merely another instance of lawyers, insecure about their ability to communicate, eschewing the use of one word when two or three will do just as well?[81]

The best way out of this linguistic morass is through a reference to the established construction of "transaction or occurrence" under federal rule 13(a).[82] A counterclaim arises out of the same transaction or occurrence as the original claim when there is any logical relation between the counterclaim and the original claim.[83]

E. Mixing Legal and Equitable Claims

What if the plaintiff's original claim is asserted in circuit court and the defendant's counterclaim is one ordinarily cognizable only in equity? For example, a building contractor, in circuit court, alleges breach of contract against an owner who has refused to make progress payments. The owner claims that the contractor has abandoned the job and seeks specific performance. Even though ordinarily claims for specific performance may be brought only in equity, the owner's claim is a compulsory counterclaim. If, after the equitable counterclaim has been asserted, the defendant moves to transfer the case to chancery court, the motion should be granted. Failing transfer, however, the circuit court may proceed to adjudicate the entire controversy.[84] In effect, rule 13(a) requires the filing of a counterclaim that arguably is beyond the subject matter jurisdiction of the

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[81] *See* Williams v. Robinson, 1 F.R.D. 211, 212-13 (D.D.C. 1940) (discussion of transaction and occurrence).

[82] *See supra* notes 53-55 and accompanying text.

[83] An elaboration of the logical relationship test is found in Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co., 426 F.2d 709 (5th Cir. 1970):

> [I]t appears that a claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

Id. at 715; *see also* Werneth v. Cook, 487 F. Supp. 144, 146 (N.D. Miss. 1979) (following *Revere*—quoting pertinent language), *argued*, No. 80-3902 (5th Cir. Mar. 8, 1982).

[84] Dilworth v. Federal Reserve Bank, 170 Miss. 373, 388, 150 So. 821, 824 (1933).

court in which it is filed.[85] The ease of transfer from the court in which the action was originally brought to the court having full subject matter jurisdiction justifies this construction of the rule. Therefore, if the owner does not file his counterclaim for specific performance and the case results in a final judgment in his favor, he is barred by rule 13(a) from asserting his claim in a separate action.

The much easier case is one in which the original claim is brought in chancery court and the defendant has a legal counterclaim. In Mississippi, courts of equity have always been free to hear and adjudicate "pendent" claims of law once their subject matter jurisdiction has been properly invoked.[86] If the legal counterclaim is not filed, rule 13(a) will bar it if the action proceeds to judgment and the counterclaim is filed in a separate action in circuit court.

F. Compulsory Counterclaims and Right to Trial by Jury

The federal judiciary has had considerable experience in combining legal and equitable claims in the context of seventh amendment trial by jury cases. For example, in *Beacon Theatres, Inc. v. Westover*,[87] the plaintiff asserted in his original complaint claims that were purely equitable in nature. Defendant responded with a counterclaim at law for damages. Plaintiff sought to avoid a jury trial, since his claims were purely equitable. Defendant's legal counterclaim, however, was one to which right of trial by jury attaches.[88]

Finding that there was a seventh amendment right to trial by jury of actions at law, the Supreme Court sustained the defendant counterclaimant's demand for trial by jury.[89] If the plaintiff's complaint had been tried alone, with no legal counterclaim asserted, it could have been heard by the court sitting without a jury. Once the legal counterclaim was asserted, however, the defendant counterclaimant's constitutional right to

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[85] *See* MISS. CONST. art. VI, § 147.
[86] V. GRIFFITH, *supra* note 46, §§ 510-517.
[87] 359 U.S. 500 (1959).
[88] *Id.* at 504.
[89] *Id.* at 508.

trial by jury attached, even if the original plaintiff thereby lost whatever ephemeral right he may have had to trial by judge.[90]

Although Mississippi has no present analogy to the *Beacon Theatres* rule,[91] section 31 of the Mississippi Constitution makes trial by jury as inviolate in this state's courts as does the seventh amendment in the federal courts.[92] In addition, the Mississippi Supreme Court has recently admonished the state's chancellors that they should be sensitive and alert to the fundamental nature of a litigant's right to a jury trial when both legal and equitable claims are involved.[93]

Because of the continued separation of law courts and equity courts in Mississippi, *Beacon Theatres*, if it became the accepted construction of section 31 of the Mississipi Constitution, would require that a legal counterclaim in a chancery action be transferred to circuit court, where a jury trial would be available. The prevailing Mississippi practice does not follow this procedure.[94] Traditionally, the presence of an equitable issue has given the chancery court full subject matter jurisdiction over the entire controversy, even those claims and issues to which a section 31 constitutional right to trial by jury attaches.[95]

The Rules do not change chancery courts' subject matter jurisdiction. The power to hear the "pendent" legal claim still exists. If, however, the legal counterclaim involves the counterclaimant's section 31 right to trial by jury, the chancery court should protect that right by transferring the case to circuit court.

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[90] *Id.* at 510-11.

[91] Mississippi courts are not bound to construe the state constitution in the same manner the federal courts construe the seventh amendment. Masonite Corp. v. Lochridge, 163 Miss. 364, 385, 141 So. 758, 759-60 (1932).

[92] Robertson v. Evans, 400 So. 2d 1214, 1215 (Miss. 1981).

[93] *Id.*

[94] *See, e.g.*, Matthews v. Thompson, 231 Miss. 258, 290, 95 So. 2d 438, 452 (1957) (chancery court has discretionary power to direct trial by jury); Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 191, 113 So. 433, 434 (1927) (decision to grant jury trial at chancellor's discretion).

[95] Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 191, 113 So. 433, 434 (1927). The *Talbot* court stated that although a section 31 right to trial by jury may be violated by the chancellor's erroneously assuming jurisdiction over a case, section 147 of the Mississippi Constitution prevents the supreme court from reversing jurisdiction erroneously taken by the chancery court. *Id.*

G. *Other Requirements for a Compulsory Counterclaim*

The above discussion has involved the first requirement for a compulsory counterclaim, that it arise out of the same transaction or occurrence as the plaintiff's original claim. Several additional factors must be present for a counterclaim to be compulsory.

First, the counterclaim must have accrued at the time the defendant counterclaimant serves his responsive pleading.[96] The claim must be one upon which the defendant could have maintained an original action seeking substantive relief. For example, even if a defendant has the right to seek a declaratory judgment on a claim, if he has not yet suffered damages, the claim is not a compulsory counterclaim.

Second, a counterclaim is not compulsory if it would require bringing in parties over whom the court cannot acquire jurisdiction.[97] Suppose, for example, the counterclaim is to be asserted against the original plaintiff and another counter-defendant. If the second counter-defendant is not in the state and is beyond the reach of the state's long arm statute, the counterclaim is not compulsory, even though it arises out of the same transaction or occurrence as does the plaintiff's claim. Finally, a claim is not a compulsory counterclaim if, at the time the plaintiff filed his action, the claim was pending in another lawsuit.[98]

H. *Mississippi's Counterclaim Rule Under* Shaffer v. Heitner

Mississippi has added another exception to the general rule that all the defendant's matured claims arising out of the same transaction or occurrence as the plaintiff's original claim are compulsory counterclaims. The defendant's counterclaim will not be compulsory if the plaintiff's original action was initiated through attachment or through any other process by which the court has not acquired in personam jurisdiction over the defen-

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[96] MISS. R. CIV. P. 13(a). Rule 13(e) allows a claim that either accrued or matured after the defendant served his pleading to be presented as a counterclaim by supplemental pleading.

[97] *Id.* 13(a).

[98] *Id.* 13(a)(1).

dant.[99] There is no comparable provision in federal rule 13(a).

At one time, this exception might have been desirable. With *Shaffer v. Heitner*[100] on the books, however, the rule becomes much less important. *Shaffer* held that assertions of state judicial power over nonresidents through in rem or quasi in rem jurisdiction are subject to the purposeful activities and traditional notions of fair play and substantial justice tests of *International Shoe Co. v. Washington*[101] and *Hanson v. Denckla.*[102]

Since *Shaffer,* Mississippi's courts have had no power to affect the substantial rights of a nonresident unless that nonresident has such minimum contacts with the state that subjecting him to the state's process would not offend traditional notions of fair play and substantial justice. This rule applies even though the defendant may own property in the state that under previous practice could have been subjected to quasi in rem jurisdiction.[103]

Therefore, if *International Shoe* and *Hanson* prevent Mississippi's courts from rendering a valid judgment affecting the substantial rights of the defendant, it follows that the state has no authority to require the defendant to assert his counterclaim. Mississippi rule 13(a)(2) may, therefore, be characterized as unnecessary or as stating the obvious.

I. Where an Insurer is Defending

Mississippi has made another addition to federal rule 13. The defendant's claim against the plaintiff is not a compulsory counterclaim if the defense of the plaintiff's original claim is being handled by an insurer. The automobile accident case is the obvious example. Two automobiles collide and each party sustains damage. Plaintiff brings an action for personal injuries and property damage, charging the defendant with negligence in the premises. The defendant turns the matter over to his liability insurance carrier, who assumes the defense of the claim. Al-

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[99] *Id.* 13(a)(2).
[100] 433 U.S. 186 (1977).
[101] 326 U.S. 310 (1945).
[102] 357 U.S. 235 (1958).
[103] 433 U.S. at 209.

though the insurer is financing the defense of the action under the duty to defend clause in the defendant's insurance policy, the defense lawyer's ethical obligation is unmistakably to the insured. Under rule 13(a), the defendant's claim for his own personal injuries or property damage is not a compulsory counterclaim.[104]

J. Lessons from the Federal Courts

A federal counterclaim case from which Mississippi practitioners can learn much is *Plant v. Blazer Financial Services.*[105] There, the plaintiff brought an action in district court alleging violations of the Truth in Lending Act.[106] Such actions may be brought in state courts as well as in federal courts.[107]

In *Plant,* the plaintiff was in arrears on an installment obligation at the time the action was brought.[108] Blazer failed to assert any claim on the installment debt in the original action but, after the action was concluded, Blazer filed a separate action on the arrearages. The court of appeals held that this claim was a compulsory counterclaim.[109] If Blazer had wanted to collect the debt, the only course available was to assert its counterclaim in the truth in lending action. Since Blazer did not bring the claim in the original action, it was barred.[110]

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[104] The reader should compare, however, Dindo v. Whitney, 451 F.2d 1 (lst Cir. 1971). Whitney, the passenger, and Dindo, the driver, were both injured in an auto accident. Whitney sued Dindo, who was defended by an insurance company. Dindo failed to raise a counterclaim arising out of the accident. Subsequently, the case was settled. *Id.* at 2. Dindo then sued Whitney. The district court granted Whitney's motion for summary judgment based on Dindo's failure to raise his counterclaim in the first suit. On appeal, the summary judgment was vacated and the case remanded. *Id.* at 3.

[105] 598 F.2d 1357 (5th Cir. 1979).

[106] 15 U.S.C. §§ 1601-1691f (1976).

[107] Lewis v. Delta Loans, Inc., 300 So. 2d 142, 144 (Miss. 1974).

[108] 598 F.2d at 1359.

[109] *Id.* at 1363.

[110] *Id.* at 1364. The reader should contrast White v. World Fin. Inc., 653 F.2d 147 (5th Cir. 1981). The court in that case noted that since Mississippi had no statutory compulsory counterclaim, a debtor was not required to bring his federal truth in lending claim as a compulsory counterclaim in an earlier action filed in state court by the creditor on the debt. *Id.* at 151. It is likely that under MISS. R. CIV. P. 13(a), the debtor would be required to file his truth in lending claim as a counterclaim in any state action on the debt.

Under rule 13 in Mississippi practice, if a plaintiff who brings a truth in lending action is in arrears on his obligations, the defendant must bring its action on the underlying debt as a counterclaim or lose the claim.[111] Of course, if the plaintiff debtor is current on his obligations, the opposite result would obtain. The lending agency would be free to bring a separate action later if the debtor defaulted.

Federal diversity litigation has illuminated another problem area likely to develop under Mississippi rule 13(a). Mississippi's corporate door-closing statute precludes certain foreign corporations, those that transact business in Mississippi without first qualifying to do business, from bringing an action in any court in the state.[112] Consider, however, the nonqualified corporation that is haled into court in Mississippi under the long-arm statute.[113] The door-closing statute makes it clear that the corporation may defend the action. But what if the corporation has a counterclaim, a cross-claim, or a third-party claim that it wishes to file? Two Mississippi federal cases offer helpful answers.

Environmental Coatings, Inc. v. Baltimore Paint & Chemical Co.[114] considered the question in the context of counterclaims and third-party claims. Environmental Coatings brought a diversity action against Baltimore Paint, a nonqualified foreign corporation. Baltimore Paint asserted a compulsory counterclaim and a third-party claim. The district court, dismissing both these claims, held that Baltimore Paint was subject to the bar of the door-closing statute, even as to counterclaims and

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[111] An analogous case is Lawhorn v. Atlantic Ref. Co., 299 F.2d 353 (5th Cir. 1962). Lawhorn sued Atlantic for breach of contract. The district court granted Atlantic's motion to dismiss under FED. R. CIV. P. 12(b)(6). 299 F.2d at 355. Subsequently, Atlantic sued Lawhorn on the same contract, alleging that Lawhorn was in arrears on an open account. Lawhorn argued that Atlantic's claim should have been filed in the first suit as a compulsory counterclaim. The court of appeals held that since Lawhorn had failed to state a claim in the first case, the counterclaim stage was never reached. *Id.* at 356. The court noted that rule 13 requires a counterclaim to be asserted in the defendant's pleading, and since technically speaking a motion is not a pleading, the first case never reached the pleadings stage. *Id.* at 356-57. Had Atlantic's motion to dismiss been overruled and Atlantic filed a pleading, then the counterclaim would have been compulsory.

[112] MISS. CODE ANN. § 79-3-247 (1972).

[113] *Id.* § 13-3-57 (Supp. 1981).

[114] 617 F.2d 110 (5th Cir. 1980).

third-party claims.[115]

The court of appeals reversed, holding that "this door-closing statute . . . does not deprive a defendant of the right to present compulsory counterclaims and third-party complaints."[116] The court noted that neither it nor the Mississippi Supreme Court had ever decided the question. The court reasoned that the door-closing statute allowed nonqualified corporations to defend lawsuits and that the assertion of counterclaims and third-party claims were merely a part of that defense. The court concluded that "presumably, the Mississippi legislature would not have expressly permitted defense by nonqualifying corporate defendants but impliedly circumscribed the scope of that defense by denying the right to bring compulsory counterclaims or third-party complaints."[117]

Park v. Cannco Contractors, Inc.[118] considered only a third-party claim. Park sued Cannco, a nonqualified foreign corporation. Cannco then invoked federal rule 14(a) and asserted a third party claim against F.W. Burdine Company. Burdine moved to dismiss the third-party complaint on the authority of the door-closing statute. The district court overruled the motion and held that the statute did not preclude Cannco's filing its third-party complaint.[119]

Even though *Environmental Coatings* and *Park* deal only with counterclaims and third-party claims, their logic requires the same result where a cross-claim is asserted by a nonqualified foreign corporation. There is, of course, no positive law compelling the Mississippi Supreme Court to follow *Environmental Coatings* and *Park*. Indeed, two factors indicate that the Mississippi court may not follow the federal decisions. First, the Mississippi Supreme Court remains the ultimate authoritative interpreter of the door-closing statute. If the Mississippi Supreme Court rules that the door-closing statute bars counterclaims by nonqualified foreign corporations, the federal judiciary must fol-

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[115] *Id.* at 111.
[116] *Id.*
[117] *Id.* at 112.
[118] 446 F. Supp. 24 (N.D. Miss. 1977).
[119] *Id.* at 25.

low suit.[120] Second, both *Environmental Coatings* and *Park* may have been influenced by the strong federal policy of opening the doors of the federal courts to litigants asserting claims.[121]

Nevertheless, *Environmental Coatings* and *Park* should be followed by Mississippi courts interpreting the Missisippi rules; there is much to be said for uniformity in interpreting the identical language of the federal and Mississippi versions. A disparity in interpretation would inevitably lead to forum shopping, which has been a perceived evil for at least half a century.

More importantly, *Environmental Coatings* and *Park* announce a sound rule. This rule does not apply to nonqualified, nonresident corporations that voluntarily seek the use of Mississippi's courts. Instead, this rule concerns a class of nonresidents brought into Mississippi's courts against their will. Their engaging in purposeful activities in this state is deemed sufficient to subject them to adjudications affecting their important rights.[122] It would hardly comport with traditional notions of fair play and substantial justice for these nonresidents to be told they can be forced to litigate in Mississippi but without the procedural advantages available to other defendants.[123]

IV. Cross-Claims—Rule 13(g)

Under the former practice, cross-claims were not allowed in circuit court.[124] On the other hand, chancery practice has long allowed co-defendants to file and serve cross-claims against each other.[125]

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[120] Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949); Erie R.R. v. Tompkins, 304 U.S. 64, 71 (1938).

[121] *See* Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64-65 (4th Cir. 1965) (federal court not required to enforce state door-closing statute where not intimately bound up with the right being enforced).

[122] *See* Hanson v. Denckla, 357 U.S. 235, 244-45 (1958) (activities within state as basis of jurisdiction).

[123] *See* Sandford v. Dixie Constr. Co., 157 Miss. 626, 634, 128 So. 887, 890 (1930) (foreign corporations doing business in state have same procedural rights as domestic corporation).

[124] Rosetti v. Stein, 272 So. 2d 633, 634 (Miss. 1973).

[125] Jackson v. Lemler, 83 Miss. 37, 43, 35 So. 306, 307 (1903); Miss. Code Ann. § 11-5-37 (1972).

A. When a Cross-Claim May Be Filed

The Mississippi rules allow joinder of multiple parties.[126] Rule 13(g) allows a party to assert a co-party such claims as he has or may have under the applicable substantive law.

Two tests must be met before a cross-claim may be asserted. First, the cross-claimant must be a party and the cross-defendant must be a co-party. Commonly, these parties will be named as co-defendants in the original complaint. Second, the cross-claim must arise out of the transaction or occurrence that is the subject matter of the original action. If a counterclaim has been filed against co-plaintiffs, one may assert a cross-claim against the other if the cross-claim arises out of the same transaction or occurrence as the counterclaim. In addition, cross-claims may be asserted regarding any property that is the subject of the original action.[127] Like all other claims joined under the Rules, cross-claims may be severed for trial.[128]

B. Cross-Claims Are Not Compulsory

Cross-claims are always permissive; the verb used in rule 13(g) is "may." A cross-claim is not waived if it is not filed in the original action. A party may assert his claim against a co-party in the original suit, or he may wait to assert it in a separate action. The cross-claim is not barred when later filed, even if it arises out of the same transaction or occurrence as the claim in the original action.[129]

The defendant who withholds his cross-claim need not worry about collateral estoppel. While the claim will inevitably present issues litigated in the original action, since no issues were litigated between the two former co-parties, collateral estoppel does not create a bar.[130]

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[126] MISS. R. CIV. P. 20(a).

[127] *Id.* 13(g).

[128] *Id.* 42(b).

[129] General Ins. Co. of Am. v. Hercules Constr. Co., 385 F.2d 13, 18-19 (8th Cir. 1967).

[130] Neal v. Gannon, 54 F.R.D. 183, 184 (W.D. Pa. 1972) (failure to cross-claim did not preclude later suit by one co-defendant against the other).

C. *The Same Transaction or Occurrence*

"Transaction or occurrence" has been discussed above in the section on counterclaims. The same term is found in rule 13(g). "Transaction or occurrence" translates into "logical relationship" under rule 13(a). At first glance, the term should mean the same under rule 13(g),[131] but there may be more to this term than meets the eye. Is it illogical to argue that "transaction or occurrence" should be read more liberally in the context of permissive cross-claims than in that of compulsory counterclaims?

If a cross-claim is determined to arise out of the same transaction or occurrence as the plaintiff's original claim, it may be filed in the pending action. But if an error is made, no one gets hurt. The cross-claim may always be severed for trial. If the cross-claim is not filed, it may be brought later in a separate action.

A compulsory counterclaim is different. If it arises out of the same transaction or occurrence as the original claim and is not asserted, it may be lost forever. Logically "transaction or occurrence" should always have the same meaning. Practically, however, the different penalties associated with failure to file cross-claims and compulsory counterclaims require different definitions of the term. Perhaps the best solution would be to give "transaction or occurrence" a single meaning; courts should then be able to compensate for the differing penalties by being reluctant to hold doubtful counterclaims compulsory while liberally allowing cross-claims.

An important recent Mississippi federal case concerning the transaction or occurrence test is *Amco Construction Co. v. Mississippi State Building Commission.*[132] The case arose out of contracts for construction at a state park. The contractor abandoned the job. The original action was brought by a materialman against the contractor's surety under a payment and performance bond. Several other materialmen intervened with similar claims. The surety then filed a third-party complaint against the owners, the contractor, and the project engineer for

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[131] Benson Mfg. Co. v. Bell Tel. Co., 35 F.R.D. 29, 33 (E.D. Pa. 1964).

[132] 602 F.2d 730 (5th Cir. 1979).

indemnification of its losses caused by the contractor's abandonment of the job. At this point, the case finally reached the cross-claim stage. The contractor and the owner filed cross-claims against each other, each one alleging the other's breach of the original construction contract.

The court of appeals ruled that the cross-claims did not arise out of the same transaction or occurrence as the original action against the surety.[133] The *Amco* decision is troublesome, no doubt in part because it is so wrong.[134] Under the Fifth Circuit's own "logical relationship" test,[135] the case involved an allowable cross-claim. The subject matter of the original action was the state construction project and the problems associated with it. The cross-claim was not only logically related to that subject matter; it was at its heart. Yet, for reasons not articulated, the court concluded that the "cross claim stands apart; it is a cause of action wholly independent and separate."[136] This conclusion ignores the fact that rule 13(g) talks about cross-claims related to the same transaction or occurrence as the original claim, not the same cause of action.

As has been said before, identical provisions of the Mississippi and federal versions of the Rules should be interpreted uniformly. *Amco* appears to call for a departure from this policy. It incorrectly construes federal rule 13(g). Mississippi's lawyers, many of whom practice in both federal and state courts, should

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[133] *Id.* at 733. The court found:

> The original claim here was a suit on a performance and payment bond brought by a subcontractor of the general contractor against the surety of the general contractor. The proposed cross claim was between two third party defendants who had been sued by the surety for indemnification . . . . The proposed cross claim did not arise from the same transaction which gave rise to the original claim, nor did it arise during the course of the main claim, nor did it comprise an integral part of the main claim.

Id.

[134] The late professor Lon L. Fuller of the Harvard Law School (who taught the author two courses in law school) had a useful test for the correctness of a judicial decision: Try to explain it to an intelligent layman. The court of appeals should have subjected its *Amco* decision to this test before it was released.

[135] *See* Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970) (claim ancillary when it bears logical relationship to facts constituting primary claim upon which court has independent basis of jurisdiction).

[136] 602 F.2d at 733.

not be saddled with differing translations of "transaction or occurrence" in the two court systems. *Amco* should have been held a classic illustration of the workings of the liberal joinder at pleadings/liberal severance at trial theory underlying the rules on joinder of parties and claims. As confident as we are that *Amco* has been wrongly decided, the better course for Mississippi courts faced with rule 13(g) problems would be to follow the lead of the Fifth Circuit.

D. Joinder of Legal and Equitable Claims

Cross-claims are treated like other claims that may be brought in the original action; both legal and equitable claims may be joined. For example, legal cross-claims may be brought in an interpleader action, which is clearly cognizable in equity.[137]

E. Claims for Indemnity and Contribution

Rule 13(g) provides that a cross-claim may allege that the cross-defendant is liable to the cross-claimant for all or part of the plaintiff's claim against the cross-claimant. In other words, cross-claims for indemnity or contribution may be filed.[138]

1. Indemnity Claims

Rule 13(g) allows a party to bring his claim at an earlier time than was allowed by prior practice. An indemnity claim provides an illustration.

"An obligation to indemnify may arise from a contractual relation, from implied contractual relations, or out of liability imposed by law."[139] The obligation arises when an indemnitee, acting under compulsion, pays a claim that should have been

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[137] *See* Jefferson Standard Ins. Co. v. Craven, 365 F. Supp. 861, 865-66 (M.D. Pa. 1973) (cross-claim against fund not interpled allowed although case was interpleader action).

[138] MISS. R. CIV. P. 13(g). If the cross-defendant may be liable to the cross-claimant for all of the plaintiff's original claim, the cross-claimant brings an indemnity claim. If the cross-defendant may be liable to the cross-claimant for only a part of the plaintiff's original claim, the cross-claimant asserts a claim for contribution. *See supra* notes 84-86 and accompanying text.

[139] Bush v. City of Laurel, 215 So. 2d 256, 259 (Miss. 1968).

paid by the indemnitor.[140] Under the prior practice, the indemnitee was required to pay the third party before he could assert his claim against the indemnitor. In other words, the loss for which indemnity was sought must have been suffered before the claim could be filed.

Under rule 13(g), one may assert cross-claims alleging that the defendant "is or may be" liable to indemnify the cross-claimant. "May be" indicates that a claim for indemnification may be asserted before the plaintiff's claim is actually paid, since the indemnity claim accrues only when the cross-claimant pays the plaintiff. If the cross-claimant prevails on the merits, the trial court will enter, along with its final judgment in favor of the plaintiff, a conditional judgment in favor of the cross-claimant and against the cross-defendant. Once the cross-claimant has paid the plaintiff's claim, his conditional judgment may be converted automatically into a final judgment against the cross-defendant.

Rule 13(g) gives no new substantive rights to cross-claimants; it merely advances the time at which the claim may be asserted. The cross-claimant need no longer wait until he has actually been deprived of his assets. The cross-claim rule thus achieves the desirable result of shielding the indemnitee from the loss of his funds over a claim that the law says must be paid by the indemnitor.

2. Contribution Claims

Rule 13(g) does not change the substantive Mississippi law concerning contribution among joint tortfeasors. Mississippi steadfastly holds that there may be no contribution among joint tortfeasors. Under section 85-5-5 of the Mississippi Code, only after two or more joint tortfeasors have been sued and their liability reduced to judgment does any right of contribution arise.[141]

With one narrow exception,[142] plaintiffs in Mississippi re-

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[140] Southwest Miss. Elec. Power Ass'n v. Harragill, 254 Miss. 460, 466-68, 182 So. 2d 220, 222-23 (1966).

[141] MISS. CODE ANN. § 85-5-5 (1972); MISS. R. CIV. P. 14 comment.

[142] MISS. R. CIV. P. 14(a) provides that after a third-party defendant has been

main free to sue whom they want at any time. For example, in the typical automobile accident case, plaintiff, a guest passenger in *D-1*'s automobile when it was struck by *D-2*'s auto, may sue *D-1* and *D-2* in the same action. May *D-1* assert a cross-claim against *D-2*?

The requisites of rule 13(g) appear to have been met. *D-1* and *D-2* are co-parties. *D-1*'s claim certainly arises out of the same transaction or occurrence as does the plaintiff's original claim. If *D-1* is claiming for his own personal injuries and for damages to his car, there is no problem; he may file the cross-claim.

But what if *D-1* asserts a cross-claim for indemnity, alleging that he was merely a passive tortfeasor and that *D-2* supplied all of the active negligence causing the accident? Alternatively, suppose that *D-1* asserts a cross-claim for contribution, charging that *D-2* was responsible for a substantial part of the negligence that caused the action.

Both of these cross-claims may be filed; they pass the transaction or occurrence test. They must, of course, withstand a rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. Here the acceleration aspect of rule 13(g) must be kept in mind. The cross-claimant will withstand a rule 12(b)(6) motion where he asserts any claim arising under the otherwise applicable positive law that the cross-defendant may, by reason of some future event, become liable to the cross-claimant. The rule 12(b)(6) motion will be withstood if the other formal requisites of rule 13(g) are met. If the cross-claim passes the rule 12(b)(6) test, it may be litigated in the present action or severed for a separate trial under rule 42(b). If, however, it fails the rule 12(b)(6) test, the cross-claim must be dismissed.

Again, the rule in no way enlarges a cross-claimant's substantive rights beyond those he would enjoy if the rule did not exist. Under the above analysis, *D-1* may file his cross-claim for contribution. He may not, however, obtain judgment on his cross-claim until after a judgment that satisfies all of the condi-

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brought in, the plaintiff must assert any related claim against the third-party defendant or be estopped to assert his claim in a subsequent proceeding. The effect is compulsory on the same terms as is a counterclaim under rule 13(a). *Id.* comment.

tions of section 85-5-5 has been entered in favor of the original plaintiff. Rule 13(g) merely accelerates the time when the cross-claim under section 85-5-5 may be asserted. It in no way accelerates the time at which the claim may give rise to a judgment in favor of the cross-claimant against the cross-defendant.

Still, there is a definite advantage given the cross-claimant in this setting. If he anticipates the possibility of the kind of joint and several judgment that gives rise to a contribution claim, he should have his claim on file against the cross-defendant. He should also be sure that the cross-defendant is subject to the in personam jurisdiction of the court and, in effect, be ready to go once the joint judgment is entered. The cross-claimant thus need not start from scratch and file an entirely new lawsuit once the judgment is entered. In fact, there is no sensible reason why the trial court should not enter the kind of conditional contribution judgment described above immediately after it enters the joint and several judgment against the tortfeasors.

3. *Ex Contractu* Contribution Claims

While joint tortfeasors may not sue each other for contribution, in other circumstances where an action for contribution will lie under Mississippi's established substantive law, rules 13(g) and 14(a) are available as procedural vehicles through which a defendant in a pending action may assert such a claim.

In general, Mississippi law allows a claim for contribution if the claim arises *ex contractu* and not *ex delicto*.[143] In such a case, rules 13(g) and 14(a) accelerate the time at which the claim may be asserted. Not only may a defendant assert that a cross-defendant or third-party defendant *is* liable for part of the plaintiff's original claim; he may also allege that the other party *may be* so liable at some time in the future.

V. Third-Party Practice—Rule 14

We have discussed above the claims that the parties to a

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[143] Trinidad Asphalt Mfg. Co. v. Gregory, 166 F.2d 745, 747 (5th Cir. 1948); Celotex Corp. v. Campbell Roofing & Metal Works, 352 So. 2d 1316, 1318 (Miss. 1977); Aven v. Singleton, 132 Miss. 256, 266-67, 96 So. 165, 167-68 (1923).

lawsuit may, and on occasion must, assert against other parties to the lawsuit. But what about the claim a defendant or counter-defendant wishes to assert against someone not before the court? Rule 14 on third-party practice provides some answers.

Heretofore in Mississippi there was no third-party practice. In chancery court, parties not joined by the plaintiff in his original pleading could not be brought in at the instance of a defendant.[144] Certainly, in circuit court a defendant had no right to implead third parties. In both courts a plaintiff could, with permission of the court, amend his pleading to bring in new defendants.[145] While defendants have always been able to assert defensively the plaintiff's failure to join a party that should have been joined,[146] defendants have never had a prerogative to attempt to have a non-party joined.

A. Rule 14(a) Third-Party Claims and Rule 13(g) Cross-Claims Compared

Rule 14 impleader changed the former rule in all Mississippi trial courts of record. A defendant may now join as a third-party defendant anyone not a party to the original action who is or may be liable to him for all or part of the plaintiff's claim. This is a perfectly sensible rule. It has worked well in the federal courts. Because of rule 42(b)'s severance provisions, there is no reason why Mississippi's trial lawyers should do anything but applaud it.

In many ways, rule 14 impleader is similar to cross-claims under rule 13(g). The claim asserted in both instances will generally be in the nature of an indemnity claim. If otherwise allowable, claims for contribution may be asserted under both rules 13(g) and 14. The difference is merely that the cross-claim is asserted against one already a party to the action, while the third-party complaint will name and be served upon one theretofore not in the case. This person becomes a third-party

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[144] Bishop v. Miller, 48 Miss. 364, 368-71 (1873); Ladner v. Ogden, 31 Miss. 332, 340-43 (1856).

[145] Caperton v. Winston County Fair Ass'n, 169 Miss. 503, 508-09, 153 So. 801, 802 (1934); Palmetto Fire Ins. Co. v. Allen, 148 Miss. 97, 105-06, 114 So. 145, 147 (1927).

[146] A.K. McInnis Lumber Co. v. Rather, 111 Miss. 55, 59, 71 So. 264, 265-66 (1916).

defendant.

There is one other difference of note. The range of claims that may be filed as cross-claims is broader than the range accorded third-party complaints. The cross-claim need not be an indemnity or contribution claim; if it arises out of the same transaction or occurrence as the original claim, it may be filed. On the other hand, the third-party claim must be for indemnity or contribution; it is not enough that the third-party claim merely arise out of the same transaction or occurrence as the original claim.

Mississippi rule 14(a) has the same acceleration feature described above in the discussion of cross-claims. This aspect of federal rule 14(a) came under attack early in its existence. In *Jeub v. B/G Foods, Inc.*,[147] the plaintiffs were injured by canned ham purchased from the defendant.[148] The defendant had purchased the ham for resale from Swift & Company. Swift was made a third-party defendant and took the position that rule 14 abridged its substantive rights by allowing indemnity claims to be asserted before they had matured.[149] The district court found that any right of indemnity that B/G might have against Swift must be governed by state substantive law. Further, the court noted that the invoking of rule 14 must not do violence to the substantive rights of the parties. The court continued, however, by holding that an acceleration of the presentation of such rights did not conflict with any state law. Further, B/G's inability to sue Swift at that time for a money recovery did not mitigate against B/G's right to invoke rule 14.[150]

B. Compulsory Third-Party Claims

What does the plaintiff do once the third-party defendant has been impleaded? For example, plaintiff sues the driver of an automobile for personal injuries received in an automobile accident. Defendant answers, denies all fault of his own, and files a third-party complaint against the automobile manufacturer. De-

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[147] 2 F.R.D. 238 (D. Minn. 1942).
[148] *Id.* at 239.
[149] *Id.* at 240.
[150] *Id.*

fendant claims that he was without negligence and is otherwise legally blameless. He further charges that the accident occurred because of a defective steering mechanism that is solely the manufacturer's responsibility. At this point, the plaintiff has on file only his claim against defendant, and the defendant has on file his third-party claim against the third-party defendant.

What happens if the plaintiff wants to sue the manufacturer? Under rule 14(a), a third-party defendant must be liable for all or part of the plaintiff's claim. At this stage of the proceedings, however, the plaintiff has no claim on file against the third-party defendant.

Rule 14(a) preserves the plaintiff's right to sue whom he wishes, but it severely restricts his discretion to file that suit whenever he wishes. Our hypothetical plaintiff is in the same predicament as a defendant who possesses a compulsory counterclaim. He may amend his complaint to assert a claim directly against the third-party defendant, the manufacturer. He is under no compulsion to do so, but his claim against the third-party defendant is barred unless it is brought in the original action.[151]

Mississippi rule 14(a) differs from its federal counterpart. Federal rule 14(a) is wholly permissive; without penalty the plaintiff may file or withhold his claim against the third-party defendant. The difference in the two rules makes sense if one considers that in federal court the drive to litigate all related claims in a single action is restricted by the court's limited subject matter jurisdiction.[152]

C. Joinder of Legal and Equitable Claims

Legal and equitable claims may be joined under rule 14(a). For example, a plaintiff brings a clearly equitable claim in chancery court. The defendant brings in a third-party defendant

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[151] MISS. R. CIV. P. 14(a) provides that the plaintiff's failure to assert against the third-party defendant a claim arising out of the same transaction or occurrence as the plaintiff's claim has the same effect as a failure to state a compulsory counterclaim.

[152] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374-76 (1978) (federal court, as court of limited jurisdiction, cannot hear suit against third-party defendant when diversity jurisdiction lacking).

under rule 14(a). The plaintiff has a matured claim against the third-party defendant that arises out of the same transaction or occurrence as the original claim. The plaintiff's third-party claim is strictly a claim at law that normally would fall within the subject matter jurisdiction of the circuit court, not the chancery court. Under Mississippi rule 14(a), the plaintiff must amend his complaint and assert his legal claim or it will be lost forever.

In Mississippi, once chancery's subject matter jurisdiction properly attaches, the chancery court should proceed to adjudicate all claims and issues, even those at law. If the equity claims are settled, the law claims may still be heard fully in the chancery court.[153]

The same result obtains when the original claim is a legal one, filed in circuit court, and the third-party claim is normally cognizable in equity. Rule 14(a) dictates that the plaintiff file his equitable claim in the circuit court or forever hold his peace.[154]

For the same reasons discussed in connection with compulsory counterclaims, the rule is appropriate. Once the third-party claim is filed, either party to it may move for transfer to chancery court. Such transfer should be granted, unless the right to trial by jury would be thwarted. If the transfer is not granted, it is unlikely that the sun would cease to rise in the east if the circuit court administered a little equity.[155]

D. Practical Effects of Plaintiff's Failure to Amend to Sue Directly Third-Party Defendant

Once the third-party auto manufacturer has been impleaded, the plaintiff may be hesitant to amend to proceed against him. Perhaps the plaintiff feels that he has a strong case against the original defendant. If he proceeds against the manufacturer and becomes enmeshed in the intricacies of a products liability claim, he may greatly complicate his claim and render

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[153] Atkinson v. Felder, 78 Miss. 83, 85, 29 So. 767, 768 (1900); Georgia Pac. Ry. Co. v. Brooks, 66 Miss. 583, 595, 6 So. 467, 468 (1889); V. GRIFFITH, *supra* note 46, § 28.

[154] *See* Magee v. Griffin, 345 So. 2d 1027, 1032 (Miss. 1977) (paramount concern of judiciary is to prevent multiple suits when one will suffice).

[155] *Cf.* Dilworth v. Federal Reserve Bank, 170 Miss. 373, 389, 150 So. 821, 824 (1933) (reversed and remanded to chancery to allow equitable defenses unavailable in circuit).

his case far more expensive than it otherwise would have been. So the plaintiff leaves it to the original defendant, who is most likely being defended by a liability insurer, to go after the manufacturer. Plaintiff may pick and choose the discovery in which he will participate; he is not required to have a claim against the third-party defendant to obtain discovery from him.[156]

If, on the eve of the pretrial conference, plaintiff concludes that he has a claim against the manufacturer, his motion to amend should be looked upon with favor. Since plaintiff's claim will be one arising out of the same transaction or occurrence as the third-party complaint, the third-party defendant will likely be unable to show any prejudice from the amendment.

If, on the other hand, the plaintiff fails to amend, is he entitled to have the issue of the manufacturer's liability adjudicated? Suppose that the entire matter is submitted to the trier of fact and that, when the dust settles, judgment has been entered for plaintiff and against the third-party defendant manufacturer only—with plaintiff's complaint against the original defendant driver dismissed with prejudice. *Wasik v. Bork*[157] gives some clues as to how these questions should be answered. The facts were essentially identical to the above hypothetical. The jury in *Wasik* found for the personal injury plaintiff and against the automobile manufacturer. At the same time, it absolved the original defendant driver from all fault. Judgment was entered in accordance with the verdict, even though plaintiff had never amended to make a claim against the third-party defendant manufacturer. On appeal, the judgment was affirmed.[158] The court found that Ford, the auto maker, had litigated its liability by implied, if not express, consent. That the plaintiff had no pleading on file against Ford was deemed irrelevant.[159]

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[156] *See* Schlagenhauf v. Holder, 397 U.S. 104, 115-16 (1964) (party to be examined must be party to action but discovering party need not have filed a cross-claim against him).

[157] 423 F.2d 44, 46 (2d Cir. 1970). In *Wasik*, the court dealt with federal rule 15(b), which provides: "When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The first sentence of Mississippi rule 15(b) is the same.

[158] 423 F.2d at 45.

[159] The court noted: "It is undisputed that Wasik never formally sought to amend his complaint prior to or during trial to assert a claim directly against Ford. Such a

If a Mississippi third-party defendant wants to avoid Ford's fate in *Wasik,* he would be well advised to object to the plaintiff's proceeding against him without amending his original complaint. As a practical matter, if the third-party defendant raises the point, the plaintiff will likely move to amend, and the motion will almost certainly be granted. Essentially, once the third-party defendant is in the case, he is there for the full ride. He should defend the plaintiff's original claim, even if it has not been formally asserted.

E. Indemnity and Contribution Claims Under Rule 14(a)

Much that has been said about the general unavailability of the rule 13(g) cross-claim as a vehicle through which a tortfeasor might seek contribution against a fellow tortfeasor applies here. Subject to a possible practical exception to be noted below, a defendant or a third-party defendant may not invoke rule 14(a) impleader to assert his contribution claim against a joint tortfeasor. As indicated *ad nauseum,* these rules do not create any new rights. Mississippi does not allow such contribution between joint tortfeasors—only between co-judgment debtors. Nothing in rule 14(a) says otherwise.

Roe v. Bryant & Johnston Co.,[160] a Michigan federal district court case, illustrates how rule 14(a) may operate when joint tortfeasors are involved. The Michigan law applied in *Roe* appears similar to Mississippi law,[161] and the facts involved are hardly unfamiliar to Mississippi trial lawyers.

Roe was a wrongful death action arising out of an automobile-truck accident. The decedent's administrator sued the truck driver and his employer, a trucking company. Each defendant invoked federal rule 14(a) and sought to file third-party complaints against two separate third-party defendants. Each third-party defendant was the driver of a passenger vehicle whose negligence had also caused or contributed to the death of the plain-

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formal motion was made in this court, and if it were necessary to rule upon it, we would grant it." *Id.* at 46 n.1.

[160] 193 F. Supp. 804 (E.D. Mich. 1961).

[161] *See* Bush v. City of Laurel, 215 So. 2d 256, 260 (Miss. 1968) (right of indemnity against active wrongdoer arises in favor of one not actively at fault).

tiff's decedent.

Recognizing that rule 14(a) creates no new substantive rights, the *Roe* court considered two questions. First, does the defendant truck driver have a claim against the two other drivers that can withstand a rule 12(b)(6) motion to dismiss? Second, does the trucking company, sued originally only under respondeat superior, have a claim that it can assert?

The district court found that the truck driver did not have a claim against the other two drivers; any claim he had would have been for contribution. Since Michigan substantive law, like Mississippi law, did not recognize rights of contribution between joint tortfeasors, the third-party complaint was dismissed for failure to state a claim upon which relief could be granted.[162]

The trucking company's third-party complaint stood on a different footing. The trucking company was not charged with any active negligence; it was sued as the employer of the truck driver who was allegedly acting within the course and scope of his employment at the time of the fatal accident. The liability sought to be imposed upon the trucking company was vicarious liability. At worst, the trucking company was charged with passive negligence. Under Michigan law, one charged only with passive negligence has a right to indemnity against actively negligent third-party defendants.[163] The trucking company was entitled to file its third-party complaint, and any rule 12(b)(6) motion by the third-party defendants had to be overruled and denied.

Mississippi's amendment to rule 14(a) creates an interesting tension with the "no contribution among joint tortfeasors" doctrine. The crafty defendant who wants some company when he goes before the jury may file a third-party claim against his co-tortfeasor. He may frame the claim as one for indemnity and eschew the use of any allegations that could be construed as stating a claim for contribution. If the claim withstands the

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[162] Michigan law also allows for contribution among co-judgment debtors. 193 F. Supp. at 806. The third-party claim for contribution from potential co-judgment debtors should have been allowed to be filed. *See supra* note 142 and accompanying text; *infra* notes 166-67 and accompanying text.

[163] 193 F. Supp. at 807.

third-party defendant's rule 12(b)(6) motion,[164] the plaintiff knows that he has a possible claim against the third-party defendant and that under rule 14(a), unless the claim is asserted, it will be lost. The odds are that the plaintiff will proceed against the third-party defendant, either directly or as did the plaintiff in *Wasik*.[165] In any event, the original defendant has his joint tortfeasor there to keep him company before the jury.

As explained above in the discussion of cross-claims, a defendant, as a potential judgment debtor may nevertheless invoke rule 14(a) to assert his claim for contribution under section 85-5-5 against his potential co-judgment debtor. A third-party complaint may be filed against one who "may be" liable to the third-party plaintiff for part of the original claim. Rule 14(a) in no way changes the substantive right to contribution; it merely accelerates the time at which the claim may be filed. The claim does not ripen until a joint and several judgment has been filed against the defendant and the third-party defendant.

The defendant normally will want to use rule 14(a) to assert his contribution claims. He will want to have the third-party defendant in court, so that once the joint and several judgment is entered, he may proceed immediately on his contribution claim. If the defendant's claim was not asserted as a third-party claim, the defendant would have to start from scratch in a new lawsuit. If the claim was asserted, the court could enter a single judgment, with paragraph one giving judgment for the plaintiff and against the defendants and paragraph two awarding the original defendant contribution from the third-party defendant.

F. Even Fourth-Party Claims are Allowed

Third-party practice does not necessarily end with the third-party complaint. A third-party defendant may file a fourth-party complaint if the conditions of rule 14(a) are met.[166]

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[164] In practice, most rule 12(b)(6) motions are survived. *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim").

[165] *See supra* notes 157-59 and accompanying text.

[166] "A third-party defendant may proceed under this rule against any person not a party to the action or any person who is or may be liable to him for all or part of the claim in the action against the third-party defendant." MISS. R. CIV. P. 14(a).

Such fourth-party complaints are not uncommon in federal practice.[167]

Conclusion

In the preceding pages much has been said about joinder of claims and parties under the new Mississippi Rules of Civil Procedure. Much more could be said and no doubt will be said as the cases unfold in the years ahead.

In the final analysis, our courts exist to facilitate resolution of disputes—disputes that will inevitably arise as the members of our complex, interdependent society collide. We need courts that will settle those disputes effectively and justly. Though not perfect, the Rules will move us far in the right direction.

The Supreme Court of Mississippi is entitled to our thanks and our respect for having adopted the Mississippi Rules of Civil Procedure.

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[167] *See* R. Clinton Constr. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838, 841, 849 (N.D. Miss. 1977) (third-party defendant filed fourth-party complaint).

JOINDER OF CLAIMS AND PARTIES—RULES 19-25

*George P. Hewes, III**

Introduction

Rules 19 through 25 provide a good example of the practicality inherent in the Rules as a whole. Rules 19 through 25 set forth a workable and flexible set of procedures that facilitate the disposition of litigated disputes with a minimum of litigious effort, while balancing the competing interests of all concerned—the litigants, others affected by the litigation, the courts, and the general public.

The common concern of this group of rules is "parties"; these rules deal with the addition, deletion, impleading, substitution, and intervention of parties. They set forth the criteria that must be present for each of these events to occur and describe the procedures for their accomplishment. These rules will be discussed in numerical sequence, and the emphasis will be on the practical rather than on the theoretical.[1]

I. Rule 19—Joinder of Persons Needed for a Just Adjudication

Rule 19 sets forth a procedure by which the court can attempt to balance the rights and interests of all persons who are affected by a particular lawsuit. If additional persons need to be joined, the court will order that they be joined. If, for some reason they cannot be joined—for example, if the court lacks personal jurisdiction— and to proceed without them would be man-

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[1] *See generally* 7 C. Wright & A. Miller, Federal Practice and Procedure §§ 1601-1721 (1972 & Supp. 1981); 7A C. Wright & A. Miller, *supra*, §§ 1901-1962.

Rule 23, which covers class actions in the Federal Rules of Civil Procedure, is omitted from the Mississippi Rules of Civil Procedure.

ifestly unfair to the absent parties or those already parties, the action will be dismissed. There is no set formula for determining who must be joined or, if joinder is not possible, who is an indispensable party in whose absence the action must be dismissed. Each case is decided on its own peculiar facts, and the rule focuses on the practicalities of each situation.

Rule 19 provides two situations in which a party must be joined. First, he must be joined if, in his absence, complete relief cannot be accorded to those who are already parties.[2] Second, a party who claims an interest in the subject of a suit must be joined when the circumstances show that if the suit proceeds to judgment without him, his ability to protect his interest may be impaired or those already parties may be exposed to the risk of multiple obligations.[3] If these parties are subject to the jurisdiction of the court, then they *must* be joined.

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[2] MISS. R. CIV. P. 19(a)(1). The application of rule 19(a)(1) is illustrated by Prestenback v. Employers' Ins. Co., 47 F.R.D. 163 (E.D. La. 1969). An employee, injured in the course of his employment, sued two insurance companies with policies covering his employer under the Louisiana direct action statute. Although the employee alleged that the accident that caused his injuries was partly attributable to the negligence of the employer's supervisory personnel, the employer was not made a defendant. *Id.* at 164. One of the policies covered damages only in excess of $25,000, while the other policy did not cover managing employees or supervisory personnel. *Id.* at 166 & nn.5-6. Thus, if the plaintiff received a judgment for $25,000 or less for damages caused by the negligence of a supervisor, he would have no recovery against those who were parties to the suit. Therefore, the employer was an indispensable party. *Id.* at 167.

[3] MISS. R. CIV. P. 19(a)(2). In Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961), the Supreme Court illustrated the application of rule 19(a)(2). The State of Pennsylvania brought suit in state court to escheat to the state various Western Union money orders. The orders had been purchased in Pennsylvania and had not been claimed by the payees for more than seven years or by the senders when an effort was made to refund the money. *Id.* at 72-73. Western Union did not claim the money for itself but contended that a judgment for Pennsylvania in the state court would not protect Western Union from multiple liability either in Pennsylvania or in other states. Other states with similar escheat laws could lay claim to the money and would not be bound by the Pennsylvania judgment since they were not and could not be made parties to the Pennsylvania suit. *Id.* at 73. The other states potentially able to claim escheat based on their contacts with the different phases of the transactions included the state of the payee, the state of residence of the sender, and the state where the money was delivered. *Id.* at 76. In fact, the State of New York had already seized and escheated a portion of the very funds claimed by Pennsylvania. *Id.* at 74. Thus, Western Union was subject to multiple liability, and the state court could not enter an order that would protect Western Union from the possibility of paying the same obligation more than once. *Id.* at 80.

The rule states two options available to the court if the absent party cannot be joined. The court may proceed with those already before it, or it may dismiss the suit, regarding the absent party as indispensable. In reaching its decision, the court must consider four factors specified by the rule. This list is not exclusive; other factors may be included, but the court must consider the listed factors.

First, the court must consider whether a judgment rendered in the absence of the nonjoined party would prejudice him or those already parties.[4]

Second, the court must determine whether the prejudice can be lessened or avoided by inserting protective provisions in the judgment or by otherwise fashioning the relief granted. For example, suppose there are twenty claimants to the Howard Hughes estate, but only fifteen of them are before the court. The court could enter a decree making partial distribution to the fifteen but withholding an amount sufficient to satisfy the maximum that could be claimed by the absent five.[5]

Third, the court must ask whether a judgment rendered in the absence of the nonjoined party will be adequate from the stand point of the plaintiff. For example, if an injured employee may recover only from his employer, and not from the employer's insurer, then the employer is an indispensable party.[6]

The fourth determination to be made by the court is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. In *Prestenback v. Employers' Insur-*

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[4] *See* Shutten v. Shell Oil Co., 421 F.2d 869, 874-75 (5th Cir. 1970) (suit to evict defendant dismissed since defendant's lessor was not joined and would suffer prejudice by cessation of its royalty interest and creation of cloud on its title).

[5] *Cf.* Atwood v. Rhode Island Hosp. Trust Co., 275 F. 513, 519 (1st Cir. 1921) (court fashioned its decree to protect nonjoined, indispensable party's interest by retaining a sufficient sum in executor's possession to be adjudicated in separate suit), *cert. denied,* 257 U.S. 661 (1922); Occidental Petrol. Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 106 (C.D. Cal. 1971) (framing a constructive trust decree to protect nonjoined party's share of oil proceeds would render dismissal of suit unnecessary), *aff'd per curiam,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

[6] *See* Prestenback v. Employers' Ins. Co., 47 F.R.D. 163, 164, 166 (E.D. La. 1969) (discussed *supra* note 2); *cf.* Kroese v. General Steel Castings Corp., 179 F.2d 760, 762-64 (3d Cir. 1949) (in suit to compel payment of corporate dividends, personal jurisdiction over a majority of board of directors unnecessary for court to afford relief), *cert. denied,* 339 U.S. 983 (1950).

ance Co.,[7] for example, the plaintiff did not join a party in a federal court action, for fear of destroying diversity. Finding the party to be indispensable, the court dismissed the case. A decisive factor in the court dismissing the suit was the existence of a companion state court action in which the plaintiff could obtain relief.[8]

The third part of rule 19, subsection (c), is self-explanatory. It simply provides that when a lawsuit is filed without joining persons described above, they must be listed and a reason given for their not being joined. Subsection (c) poses a tactical dilemma for the pleader. By complying with the rule, he calls attention to absent parties who may be indispensable, perhaps inviting a motion to dismiss. On the other hand, a lawyer who deliberately fails to comply with the rule would certainly be inviting the displeasure of the court.

A word or two is in order about raising nonjoinder defensively. First, it can be raised by motion. Rule 12(b)(7) specifically provides for a motion based on the failure to join a party under rule 19. It can also be raised in the answer as a separate defense. Finally, nonjoinder can be raised by the court on its own motion.

Of course, the movant has the burden of showing the need for joinder. When the question of joinder may be raised is determined by whether the party is regarded as indispensable. Failure to join a party who is *not* indispensable—like the rule 12(h) defenses of improper venue, insufficiency of process, insufficiency of service of process, and lack of jurisdiction—should be raised early in the action. This defense is waived if it is not raised in the answer or in a pre-answer motion. On the other hand, failure to join an indispensable party under rule 19(b), like failure to state a claim upon which relief can be granted, can be raised even after the trial has begun. In fact, this defense has been raised successfully for the first time on appeal.[9]

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[7] 47 F.R.D. 163 (E.D. La. 1969).

[8] *Id.* at 168.

[9] *See, e.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109, 112 (1968) (court of appeals initially raised issue of joinder); Haby v. Stanolind Oil & Gas Co., 225 F.2d 723, 724 (5th Cir. 1955) (court of appeals may raise issue of failure to join); Clark v. Hutchinson, 161 F. Supp. 35, 37 (D.C.Z. 1957) (trial or appellate court

II. Rule 20—Permissive Joinder of Parties

Rule 20 simply establishes a procedure whereby several parties' demands arising out of the same basic set of facts may be tried together. The rule deals solely with the joinder of parties—not claims—and it becomes relevant only when there are multiple parties on one or both sides of the lawsuit. The purpose of the rule is to facilitate the judicial process, by eliminating, in certain situations, the possibility of multiple trials.

There are two basic requirements for the application of rule 20. First, some right asserted by two or more parties—or asserted against two or more parties—must arise out of the same transaction or occurrence. Second, there must be a question of law or fact common to all the persons in the action. It is not necessary that every question of law and fact be common to the parties—just one. It is necessary, however, that both requirements of the rule be met, that is, a right to relief arising out of the same occurrence and a common question of law or fact.[10]

Rule 20 also authorizes joinder of parties in the alternative. Alternative joinder of defendants typically arises when a plaintiff has a claim indicating he is entitled to recover from someone, but he is not sure which of the several defendants is liable. For example, *A* contracts with *B* for *B* to make widgets of cer-

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may on its own motion raise issue of failure to join indispensable party). Miss. R. Civ. P. 12(h)(2) expressly provides that this defense may be raised as late as the trial on the merits.

For the United States Supreme Court's most extensive analysis of federal rule 19, see Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

[10] *See, e.g.*, Matanuska Valley Lines, Inc. v. Neal, 229 F.2d 136, 137 (9th Cir. 1955) (suits by injured bus passengers joined in a single action against bus company and driver of truck that struck bus); DeVito v. Hoffman, 199 F.2d 468, 470 (D.C. Cir. 1952) (husband may join wife in single action against defendant who allegedly assaulted wife); Silverman v. Cinofsky, 15 F.R.D. 122, 123 (N.D. Ill. 1953) (tenants in same building may join in one suit against landlord for common violation).

Lucas v. City of Juneau, 127 F. Supp. 730 (D. Alaska 1955), provides an example of joining multiple defendants. The plaintiff was injured in a Sears, Roebuck store in Juneau. Eighteen days later, the plaintiff was transferred to a V.A. hospital in Seattle. En route to Seattle the ambulance driver suffered an epileptic seizure, lost control of the vehicle, and wrecked the vehicle; this resulted in further injury to the plaintiff. *Id.* at 730-31. The district court, concluding that the defendants were properly joined pursuant to rule 20, permitted the plaintiff to sue in the same action both the original tortfeasor and the second tortfeasor whose subsequent negligence aggravated the plaintiff's original injuries. *Id.* at 732.

tain specifications that *A* intends to sell to *C*. *C* refuses delivery of the widgets, contending they do not meet the required specifications. *A* brings suit against *B* and *C*. If the widgets were made to specifications, *C* is liable to *A*. If not, *A* can recover against *B*.

The rule requires that the right to relief arise out of the same transaction or occurrence, or series of transactions or occurrences.[11] There are no absolute rules for ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of rule 20. That must be decided on a case by case basis. On this matter, however, as well as the matter of a common question of law or fact, the courts have generally taken the position that these are flexible concepts and should be given a broad reading, specially when to do so would promote judicial economy.

There should be no problem with joining even marginally-related parties at the pleading stage because the court has discretion, under rule 20(b), to sever those parties whose claims might be more conveniently tried in a separate action. The court is also authorized to enter any other orders that will prevent a party from being prejudiced, delayed, or put to additional expense by the joinder of someone against whom he has no claim, and vice versa. It should be remembered that under rule 21 misjoinder of parties is not grounds for dismissal.

As mentioned earlier, rule 20 is a procedural rule. It does not create or affect substantive rights.[12] Separate claims do not become joint claims by the parties joining in one suit under rule 20. They remain separate, just as if each plaintiff had brought a separate suit. Moreover, rule 20 does not permit a court to acquire jurisdiction over a claim over which it otherwise does not have jurisdiction. Rule 82 specifically provides that these rules shall not be construed to extend or limit the jurisdiction of Mississippi courts.

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[11] *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 142-43 (1965) (joinder of county voter registrars proper when complaint alleged existence of statewide system of disfranchisement of blacks).

[12] *E.g.*, Gates v. DeWitt, 528 F.2d 405, 413 (5th Cir.) (rule 20(a) is a procedural rule premised on trial convenience and does not affect principles of substantive state law), *modified on other grounds*, 532 F.2d 1052 (5th Cir. 1976).

III. Rule 21—Misjoinder and Nonjoinder of Parties

Rules 19 and 20 deal with adding parties; rule 21, which is identical to its federal counterpart, deals with dropping them. Rule 21 provides that parties may be added or dropped by order of the court, on the court's own initiative or on the motion of any party. This may be done at any stage of the proceedings, and on such terms as are just. The rule's purpose is to avoid multiple litigation and to promote the liberal joinder of parties.

If a party is improperly joined, the appropriate remedy is to move, under rule 21, either to drop him as a party or to sever the claim against him. Forms twenty-seven through thirty-one of the official forms in the back of the rule book provide a variety of motions for adding or dropping a party or for severing a claim.

A party is improperly joined if he does not meet the requisites of Rule 20(a), i.e., he is not asserting with other parties a claim or defense arising out of the same facts and involving a common question of law or fact.[13] A defendant is improperly joined if none of the plaintiffs seeks any relief as to that defendant.[14] A plaintiff is improperly joined if he does not seek any relief against the defendant, or defendants, and has no real interest in the controversy. For example, suppose a husband joins his wife in her suit for loss of consortium resulting from the husband's injuries. That right of action is vested solely in the wife,

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[13] Court decisions are clearer as to what constitutes nonjoinder than as to what constitutes misjoinder. This clearness results from an application of rule 17, the real party in interest rule, and rule 19, which deals with the joinder of persons needed for a just adjudication, to the construction of rule 21. Rules 17 and 19 address the question of whom should be made parties or added to the lawsuit. Commentators have stated that rules 17 and 19 provide reference points for the meaning of "nonjoinder" in rule 21. While rules 17 and 19 are the source of the requirement that a particular person be added to the suit, rule 21 "describes the procedural consequences of failing to do so and makes it clear that the defect can be corrected." 7 C. Wright & A. Miller, *supra* note 1, § 1683, at 324.

[14] This occasionally occurs when the plaintiff challenges an institutional service or activity of a state and joins as defendants state officials who may have nothing to do with administering the program under attack. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Rockefeller, 322 F. Supp. 678, 685-86 (S.D.N.Y. 1971) (court dropped Governor as defendant in suit challenging expenditure of funds under legislative act); Rakes v. Coleman, 318 F. Supp. 181, 192-93 (E.D. Va. 1970) (complaint alleging unlawful confinement of alcoholics dismissed as to Attorney General and Governor).

and the husband would be properly dismissed from the suit. Misjoinder of parties may also result from a rule of substantive law. For example, many states, including Mississippi, prohibit the joinder of an insurer as a co-defendant in an original action against the insured.

One other word concerning nonjoinder is appropriate. The first sentence of the rule provides that misjoinder of parties is not grounds for dismissal. Nothing is said in that sentence about nonjoinder. This omission was deliberately made to avoid any conflict or confusion with rule 19(b), which *does* provide that the action can be dismissed if the nonjoined party is regarded as indispensable. Rule 19 authorizes the dismissal of the suit when "in equity and good conscience" the action cannot proceed in the absence of one or more persons. The failure to join someone whose presence is desirable, but not indispensable, is not grounds for dismissal under rule 21.

When a motion to add or to drop is made, notice should be given to the other parties. Under the federal rule, the courts have held that notice need not be given to the party whose joinder is sought nor is it necessary that proposed pleadings be served with the motion. If permission is granted to add a defendant, there must be compliance with rule 4 concerning service of process on the added defendant. If a plaintiff is added, ordinarily all proceedings are stayed until the new plaintiff enters an appearance.

Rule 21 specifically provides that dropping or adding of parties is permitted at any stage of the action. A number of courts, however, have held this defect to be waived if not raised promptly, unless, of course, the absent party is regarded as indispensable. The grant or denial of a motion to add or to drop is a matter within the discretion of the trial judge. This exercise of discretion will not be disturbed on appeal unless an abuse is shown.

A motion to add a party may raise a question as to whether the institution of the original action tolled the statute of limitations as to the proposed new party. Rule 15(c) addresses this issue and sets forth the equitable circumstances under which the

action would not be barred as to the proposed new defendant.[15]

IV. Rule 22—Interpleader

Interpleader is a procedure that permits a party holding money or property belonging to others to join those other parties and to obtain a judicial determination as to the proper disbursement of the money or property so held. A typical situation for utilizing interpleader is where there are two or more claimants to the proceeds of a life insurance policy or where there are two or more claimants to the working interest or the royalty interest in a producing oil well.[16]

Interpleader is not new to Mississippi practice. It has been a part of our Mississippi chancery practice since the early 1840's.[17] Under the new Rules, however, there is no requirement that an interpleader suit be filed in chancery court.

Interpleader, as a procedural device, provides protection in several forms. It protects the stakeholder from having to choose between two or more competing claimants, without embroiling him in the litigation. It also protects the stakeholder against the possibility of multiple lawsuits directed toward the money or property that he holds.

There are, generally, two stages in an interpleader action. The first stage is a determination of the appropriateness of interpleader. The primary test in this regard is whether the stakeholder legitimately fears multiple claims or suits against the sin-

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[15] Rule 15(c) provides that an action is not barred if the claim against the proposed new party arose out of the same transaction or occurrence described in the original complaint. Additionally, the new party (1) must have received notice of the action so as not to be prejudiced in maintaining his defense, and (2) must have known, but for a mistake concerning the identity of the proper party, that the action would have been brought against him.

[16] Interpleader has been used by casualty insurance companies when their insured was clearly liable and the legitimate claims of two or more of the injured parties exceeded the limits of the policy. *See, e.g.,* State Farm Fire & Casualty Co. v. Tashire, 386 U.S 523, 525-26 (1967) (insurer filed interpleader action to require claimants to establish claims against insured in a single proceeding); *see also* Pan Am. Fire & Casualty Co. v. Revere, 188 F. Supp. 474, 476-84 (E.D. La. 1960) (extensive discussion of interpleader).

[17] *See* Yarborough v. Thompson, 11 Miss. (3 S. & M.) 291, 294 (1844) (recognizing interpleader as a proper remedy when threatened or pending suits by separate interests claim the same debt or duty).

gle fund.[18] Most courts hold the trouble and expense of multiple suits warrant the use of interpleader, even if there is little danger of multiple liability.[19] Another threshold consideration is whether the claims equal or exceed the stake. Interpleader should not be permitted when the sum of the claims asserted is less than the liability assumed by the surety or insurer.[20] Once interpleader has been determined to be appropriate, the proceeding enters the second stage, that of deciding who is entitled to receive the money or property.

The first step in an interpleader action is the filing of a complaint by the stakeholder, seeking a determination as to the appropriateness of interpleader. The burden is on the stakeholder to show this. He joins as defendants all parties making a claim to the money or property. Two or more such adverse claimants must exist for an interpleader action to lie. Otherwise, the court has no jurisdiction.[21] In responding to the stakeholder's complaint, the claimants assert their respective claims and controvert the claims of each other.[22] There is no decision at this stage on the merits of the respective claims. The sole question, typically put in issue by a motion, is whether interpleader is appropriate. If the court determines that interpleader is appropriate, it may require the stakeholder to deposit the money into court or to post a bond. Rule 67 authorizes the placing of the monies in an interest-bearing account. Although neither the federal nor the state rule makes reference to posting a bond,[23] this is fairly common practice in interpleader cases. If the stake-

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[18] *See* United States v. Major Oil Corp., 583 F.2d 1152, 1157 (10th Cir. 1978) (remedy of interpleader available to defendant exposed to possible multiple liability); Farmers Elevator Mut. Ins. Co. v. Jewett, 394 F.2d 896, 898 (10th Cir. 1968) (same).

[19] *See, e.g.*, National Fire Ins. Co. v. Sanders, 38 F.2d 212, 214 (5th Cir. 1930) (interpleader action protects against multiple suits as well as multiple liability).

[20] *See* Fulton v. Kaiser Steel Corp., 397 F.2d 580, 583 (5th Cir. 1968) (interpleader action denied when principal and surety were not faced with claims exceeding their bond).

[21] *See* Libby, McNeill, & Libby v. City Nat'l Bank, 592 F.2d 504, 507-09 (9th Cir. 1978) (district court lacked jurisdiction where only one party made a claim against the interpled fund).

[22] Aetna Casualty & Sur. Co. v. Ahrens, 414 F. Supp. 1235, 1249-51 (S.D. Tex. 1975) (discussion of second stage of interpleader action).

[23] *See* Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1159 (5th Cir. 1976) ("deposit" not required under FED. R. CIV. P. 22).

holder has no interest in the property, the court may discharge him and enjoin the claimants from harassing him with other suits concerning the stake.

If interpleader is inappropriate for some reason—for example, if there is no real dispute as to who is entitled to the stake—the proceeding may be dismissed. If it is clear to the court who is entitled to the money or property, it can order distribution.

If the court finds interpleader to be appropriate, the proceeding enters the second stage, in which the respective rights of the claimants are determined. At this point the suit proceeds like any other litigated matter, with each claimant adverse to the other. This phase of an interpleader action can be a bench trial or jury trial.[24] It sometimes happens that the stakeholder claims an interest in the money or property at stake. If this is the case, the stakeholder stays in the proceeding and asserts his claim along with the other claimants.

The Advisory Committee Comment points out that there is no inflexible rule that an interpleader proceeding be in two stages. It could be in one stage if the stakeholder has deposited the funds into court and has asked to be discharged and it is clear to the court which of the claimants is entitled to receive the stake. The rule itself suggests that the proceeding will be in two phases since subsection (b) of the rule contemplates the discharge of the stakeholder and the action continuing between the adverse claimants. There is no comparable subsection (b) in the federal rule.

Rule 22 makes clear that any defendant exposed to a threat of multiple liability may obtain interpleader by way of cross-claim or counterclaim. Form 32 of the official forms contains a counterclaim for interpleader and provides a good example of how it might come into play.[25]

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[24] *See* Ross v. Bernhard, 396 U.S. 531, 541 n.15 (1970) (right to jury trial not precluded by use of interpleader).

[25] MISS. R. CIV. P. form 32. In the example in form 32 the defendant alleges that he has received a sum of money from one party, *E.F.*, and that the plaintiff is claiming that money under an assignment from *E.F.* The defendant asks in his counterclaim that the court make *E.F.* a party, require the plaintiff and *E.F.* to interplead their claims, discharge the defendant from liability, and award the defendant costs and attorney's fees.

It should be noted that rule 22 makes no reference to the awarding of costs and attorney's fees. Federal courts in equity, however, have historically awarded costs and attorney's fees to a successful stakeholder when circumstances indicate it is proper to do so.[26] Of course, the awarding of fees is discretionary with the court, and one of the considerations is the size of the fund. If awarded, costs and fees can be charged against the fund or assessed to the losing claimants.

It is assumed that the practice in Mississippi regarding appeals in interpleader actions will be the same as that followed in the federal courts. If an original complaint for interpleader is dismissed, that order is final, and an immediate appeal may be taken.[27] In any situation where the denial of interpleader still leaves other claims pending before the court, however, the action has not been terminated, and an appeal is generally not available.[28]

V. Rule 24—Intervention

Rule 24 is substantially the same as prior Mississippi practice. Subparagraphs (a)(1) and (b)(1) deal with statutory intervention. Subparagraphs (a)(2) and (b)(2) deal with equitable intervention. Both types of intervention were recognized in prior Mississippi practice.

Intervention under rule 24 falls into three categories: (1) intervention as a matter of right; (2) permissive intervention; and (3) intervention by the state. The basic distinction between permissive intervention and intervention of right is that permissive

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[26] Attorney's fees and costs are typically awarded when the party initiating interpleader is a mere stakeholder, has admitted liability, has deposited the fund into court, and has been discharged from futher liability. 7 C. Wright & A. Miller, *supra* note 1, § 1719, at 479-80. *But see* Minnesota Mut. Life Ins. Co. v. Gustafson, 415 F. Supp. 615, 618-19 (N.D. Ill. 1976) (award of attorney's fees should not be made absent showing of "extraordinary circumstances"; insurance company regularly encountering interpleader situations denied attorney's fees).

[27] *See* Fulton v. Kaiser Steel Corp., 397 F.2d 580, 582 (5th Cir. 1968) (court of appeals affirmed dismissal of complaint for interpleader).

[28] *See, e.g.*, Republic of China v. American Express Co., 190 F.2d 334, 335, 338-39 (2d Cir. 1951) (when stakeholder-defendant interpled new defendants and court discharged defendant of liability to plaintiffs, such order was not appealable since claims between plaintiffs and new defendants remained unresolved).

intervention is left to the discretion of the court, whereas intervention of right is dictated by law.

Both subsection (a), concerning intervention of right, and subsection (b), concerning permissive intervention, require that the application for intervention be timely made.[29] Timeliness is to be determined from all the factors and circumstances surrounding the case, including the status of the suit.[30] "Timeliness" is not a term of fixed meaning; it means that the court must consider the practical effect of intervention, that is, how it is going to affect the rights of those already parties.[31] It also means that, at least in this sense, *all* intervention is discretionary.[32] The court is not required to use the same standards in determining timeliness in every case. It may apply one set of standards when dealing with permissive intervention and another when dealing with intervention of right.[33]

There are two categories of persons who may intervene as a matter of right. First, there are those who have a statutorily granted, unconditional right to intervene. For example, when an employer, or his workers' compensation carrier, pays workers' compensation benefits, he obtains an unconditional right to intervene in a suit against a third party arising out of the job-related injury.[34]

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[29] *See, e.g.*, United Airlines, Inc. v. McDonald, 432 U.S. 385, 387 (1977) (intervention pursuant to rule 24 requires timely application); Stallworth v. Monsanto Co., 558 F.2d 257, 263 (5th Cir. 1977) (same).

[30] NAACP v. New York, 413 U.S. 345, 365-66 (1973).

[31] *See* McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1071, 1073 (5th Cir. 1970) (motion for intervention made after judgment held timely where no existing party's interests would be adversely affected).

[32] *See* SEC v. Tipco, Inc., 554 F.2d 710, 711 (5th Cir. 1977) (per curiam) (rule 24(a)(2) motion for intervention of properly denied based on trial judge's discretionary determination of timeliness).

[33] Denial of intervention that is sought as a matter of right may work serious harm to the proposed intervenor. Thus, a court would be reluctant to dismiss the request as untimely. On the other hand, when the same circumstances are present regarding the delay in seeking intervention, a court may deny a request for intervention that is permissive in nature. *See* Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir.) (noting that considerations warranting intervention of right may not justify granting permissive intervention), *cert. denied*, 400 U.S. 878 (1970). For a comprehensive discussion of intervention, see Chief Judge Clark's opinion in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977).

[34] Miss. Code Ann. § 71-3-71 (1972).

Second, if a three-part test is met there may be intervention of right in situations where the proposed intervenor claims an interest in the subject of the lawsuit. The first requirement is that the applicant claim an interest in the subject matter of the lawsuit. Second, he must be so situated that disposition of the suit in his absence will impair or impede his ability to protect that interest. If these two factors are present, the applicant will be permitted to intervene unless—and this is the third part of the test—his interest will be adequately represented by those who are already parties.

The case of *Gaines v. Dixie Carriers, Inc.*,[35] provides an illustration of the above three-part test. In *Gaines,* a law firm was permitted to intervene in a personal injury suit to protect its interest relative to a claimed fee. The plaintiff had signed a contingent fee contract with the firm, which provided, among other things, that neither the firm nor the plaintiff could dispose of the claim without the consent of the other.[36] The law firm had performed a substantial amount of work on the case when the plaintiff changed lawyers. When the plaintiff's suit was filed, the law firm sought to intervene, but the trial judge denied the request. The Fifth Circuit reversed, holding that the interest claimed by the firm was, in fact, "an interest in the subject of the action."[37] The opinion noted that neither of the parties to the suit was interested in protecting the interest of the firm.[38]

The *Gaines* case makes clear that the interest sought to be protected does not have to be of a legal nature identical with that in the main suit. In *Gaines,* the plaintiff was suing to recover for personal injuries, while the law firm was attempting to recover either on its contract or on the basis of quantum meruit for the work performed.

The rule speaks of granting intervention if the intervenor is so situated that, unless he is permitted to intervene, his ability to protect his interest will be impeded or impaired. What precisely does that mean? It was not the intent, at least on the part

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[35] 434 F.2d 52 (5th Cir. 1970) (per curiam).

[36] *Id.* at 53.

[37] *Id.* at 54.

[38] *Id.*

of the drafters of federal rule 24, that intervention be limited to those whom the action would bind by res judicata or collateral estoppel.[39] The rule speaks more to the practical consequences of a judgment in the absence of the intervenor. For example, it was obviously less difficult for the law firm in *Gaines* to collect its fee as a party to the damages suit than if it had been necessary to file an independent action to collect.

Another case illustrating the above three-part test is *Atlantis Development Corp. v. United States.*[40] In that case, Atlantis claimed that it had discovered a group of reefs off the Florida coast on which it intended to build, among other things, a hotel, a gambling casino, and a marina. Initially, both Florida and the federal government took the position that the reefs were beyond their jurisdiction; as a result, Atlantis began development.[41] In a later suit brought by the United States against another party, the United States claimed the other party had trespassed on government property by dredging in and around the reefs and by depositing material thereon. The federal government contended that the reefs were subject to its jurisdiction.[42] Atlantis sought to intervene, contending that the reefs belonged to it and that if a trespass had been committed, it was a trespass aginst Atlantis.[43] Of course, Atlantis' prime interest in seeking intervention was to dispute the Government's claim of title to the reefs. The district court denied intervention, but the Fifth Circuit Court of Appeals reversed. The Fifth Circuit held that even though Atlantis would not be bound by the judgment in the case since it was not a party, the practical effect of an adjudication that the federal government had title to the reefs would be very difficult for Atlantis to overcome later.[44] Thus, the court held that Atlantis should be made a party so that it could

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[39] *See* 28 U.S.C. app., at 433 (1976) (advisory committee notes) (stating that a literal reading of "bound" in original rule in sense of res judicata could defeat intervention in meritorious cases).

[40] 379 F.2d 818 (5th Cir. 1967).

[41] *Id.* at 820-21.

[42] *Id.* at 821.

[43] *Id.* at 821-22.

[44] *Id.* at 826-28.

protect its claim.[45]

Let us now turn our attention to what constitutes adequacy of representation for purposes of the three-part test in the rule. In *Atlantis*, the interest of the representative, the party who had done the dredging, was adverse to the intervenor, so that representation obviously was inadequate. In the case of the law firm seeking to intervene to protect its fee, neither party to the suit was interested in the firm or in its claimed fee, so that there was inadequate representation.[46] On the other hand, the courts usually hold that there is adequate representation when the interest in question is formally represented by a fiduciary such as an executor or a trustee.[47] In addition, adequate representation is usually held to be present when the United States represents the injured parties in an antitrust suit[48] or when a school board represents the patrons of a school district.[49]

Subsection (b) of rule 24 deals with permissive intervention. Subparagraph (b)(1) authorizes intervention when a statute grants a conditional right to intervene.[50] Again, the request for intervention must be timely.

The second part of the permissive intervention rule permits

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[45] *Id.* at 828-29.

[46] For a discussion of inadequate representation, see Stadin v. Union Elec. Co., 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963).

[47] *See, e.g.*, Bumgarner v. Ute Indian Tribe, 417 F.2d 1305, 1308-09 (10th Cir. 1969) (representation by administratrix held adequate).

[48] *See, e.g.*, United States v. Paramount Pictures, Inc., 333 F. Supp. 1100, 1101 (S.D.N.Y.) (motion to intervene denied since attorney general responsible for vindicating public interest), *aff'd mem.*, 404 U.S. 802 (1971).

[49] *See, e.g.*, Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352, 1354-55 (9th Cir. 1970) (school board acted adequately in representing parents of school district by not appealing desegregation decree of federal district court), *cert. denied*, 402 U.S. 943 (1971).

[50] An example of a Mississippi statute granting a conditional right to intervene is MISS. CODE ANN. § 53-3-19 (1972), which authorizes the Oil and Gas Board to seize and to sell oil produced in violation of the law. This would apply to an oil operator who produces oil from a given well in excess of the daily allowable amount set by the Board. To enforce this power, the Board is required to bring a civil suit pursuant to the procedure set forth in § 53-3-19 in the county where the oil is found. The statute provides that an interested person who shows himself to be adversely affected by the anticipated action of the Board will be permitted to intervene. The salient aspect of the procedure is that the proposed intervenor must show that he will be adversely affected by the action of the regulatory authority.

intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."[51] Perhaps the application of this language can best be explained in the negative. This portion of the rule does not require that the person seeking intervention be one "who would have been a proper party at the beginning of the suit"[52] or one who has a "direct personal or pecuniary interest in the subject of the litigation."[53] Permissive intervention has been allowed when the parties have an indirect interest in the outcome of a dispute.[54] Subsection (b) makes no mention of the interest of the intervenor; he must merely have a claim or defense in which there is a question of law or fact in common with the main action. For instance, in one case the owners of small variety and fabric stores were permitted to intervene in a suit by owners of similar stores against manufacturers that charged discrimination in favor of large chain store purchasers.[55]

Permissive intervention may also come into play when there is a statute, an executive order, or a state or federal regulation involved in the suit and the statute, order, or regulation is an integral part of the claim or defense. Under those circumstances, the office or agency charged with the enforcement of the statute or regulation may be permitted to intervene.[56]

Of course, permissive intervention is discretionary with the court[57] and can only be granted by the court where the action is pending. The principal consideration in the exercise of discretion is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[58] Since the

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[51] MISS. R. CIV. P. 24(b)(2).

[52] 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1911, at 539.

[53] SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459 (1940).

[54] *See* Archbold v. McLaughlin, 181 F. Supp. 175, 180-81 (D.D.C. 1960) (users of park allowed to intervene in suit to enjoin highway construction through public park).

[55] P.W. Husser, Inc. v. Newman, 25 F.R.D. 264, 265, 267 (S.D.N.Y. 1960).

[56] *See* Nuesse v. Camp, 385 F.2d 694, 699-700 (D.C. Cir. 1967) (state banking commissioner permitted to intervene in suit by state bank to enjoin Comptroller of Currency from authorizing a national bank to open a branch bank in state).

[57] *See, e.g.*, FMC Corp. v. Keizer Equip. Co., 433 F.2d 654, 656 (6th Cir. 1970) (trial judge exercised discretion in denying intervention near close of trial by party aware of progress of litigation); Hatton v. County Bd. of Educ., 422 F.2d 457, 461 (6th Cir. 1970) (trial judge denied intervention based on considerations of undue delay and prejudice).

[58] MISS. R. CIV. P. 24(b)(2); *see* EEOC v. United Air Lines, Inc., 515 F.2d 946, 950

court has discretion to deny intervention, it obviously has the power to impose conditions on the granting of intervention.[59] If intervention is denied, it is common practice to permit the applicant to file an amicus brief.

Finally, subsection (d) contemplates intervention by the State of Mississippi when the contention is made that a state statute is unconstitutional. This intervention may occur in one of two contexts: (1) in an action to enjoin the enforcement of an allegedly unconstitutional statute by restraining or enjoining the actions of an officer of the state or of a political subdivision; or (2) in a declaratory judgment suit, under rule 57, in which the party bringing the suit seeks a declaration that the statute in question is unconstitutional. In either of these circumstances, the party asserting the unconstitutionality of the statute is required to notify the Attorney General within sufficient time to permit him to intervene and to argue the question of the statute's constitutionality. If he elects to do so, the Attorney General shall be permitted to intervene as a matter of right.

A word or two is appropriate concerning the status of the intervenor once he has been made a party. Subject to any conditions upon intervention imposed by the court, the intervenor is entitled to litigate fully on the merits as if he were an original party. He can move to dismiss the complaint,[60] challenge the jurisdiction of the court,[61] or do anything else that could be done by the original parties.[62]

As to the procedure involved, rule 24 requires that a person

(7th Cir. 1975) (court denied request for permissive intervention when discovery had been closed).

[59] *See, e.g.*, Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 191-92 (2d Cir. 1970) (discretionary intervenor may be subject to conditions imposed to insure efficient conduct of trial); Carroll v. American Fed'n of Musicians, 33 F.R.D. 353, 354 (S.D.N.Y. 1963) (intervention granted subject to conditions of limited discovery and to issues raised in original party's complaint).

[60] *See* SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459-60 (1940) (intervenor appealed court's denial of motion to dismiss debtor's petition for arrangement under the Bankrupcy Act).

[61] *In re* Oceana Int'l, Inc., 49 F.R.D. 329, 333 (S.D.N.Y. 1970).

[62] *See* Spangler v. United States, 415 F.2d 1242, 1244-46 (9th Cir. 1969) (intervenor not limited to relief requested in original complaint); Parke & Tilford, Inc. v. Schulte, 160 F.2d 984, 988, 989 n.1 (2d Cir.) (intervenor allowed to develop theory of case), *cert. denied*, 332 U.S. 761 (1947).

seeking to intervene shall do so by motion setting forth the reasons why intervention should be allowed. The motion should be accompanied by an appropriate pleading. This procedure must be followed even though the intervenor is proceeding under a statute giving an unconditional right to intervene, and a showing of timeliness is still required.

VI. Rule 25—Substitution of Parties

Rule 25 provides for the substitution of parties in the event of death, disability, transfer of interest, or the succession in office of a public official. The rule is inapplicable for any other reason. Rule 25 is procedural. It does not provide for the survival of rights or liabilities; it merely describes the method by which the original action may proceed if the right of action survives.

Rule 25 presupposes that substitution is for someone who was already a party to a pending action. If a party dies before suit is filed but is named a defendant therein, that defect is not cured by this rule.[63] If a named defendant dies after suit is filed but before being served with process, substitution is available but process must be served on the new or substituted party to acquire jurisdiction over him.[64]

Subsection (a) of the rule deals with substitution as a result of death and applies to the death of a natural person rather than to the dissolution of a corporation.[65] The underlying purpose of subsection (a) "is to protect the repose of decedents' estates by preventing interminable delays in the distribution of assets and the closing of estates."[66] Of course, the rule assumes that the claim is not extinguished as a result of the death of the party.

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[63] *See* Mizukami v. Buras, 419 F.2d 1319, 1320 (5th Cir. 1969) (where named defendant predeceased filing of action, plaintiff's motion to substitute decedent's heirs under rule 25 denied).

[64] *See* Ransom v. Brennan, 437 F.2d 513, 515, 518-19 (5th Cir.) (court lacked personal jurisdiction over defendant's executrix when plaintiff's motion to substitute executrix as defendant not properly served), *cert. denied*, 403 U.S. 904 (1971).

[65] Unison Realty Corp. v. RKO Theatres, Inc., 35 F.R.D. 232, 234 (S.D.N.Y. 1964). The substitution of parties upon the transfer of corporate assets is governed by rule 25(c).

[66] Cheramie v. Orgeron, 434 F.2d 721, 725 (5th Cir. 1970).

The motion for substitution can be made by any party or by the successors or representatives of the deceased party. Objection to substitution may also be made by representatives of the deceased, or by any party, since the presence or absence of a given party may affect the rights of the other parties. The court should not try to resolve the merits of the controversy in passing on the motion for substitution.[67]

The motion for substitution, along with the notice of the hearing, should be served in accordance with rule 5 on those who are parties. In other words, the motion should be served on the parties' attorneys of record. If service is to be had on persons who are not parties, however, service must be in accordance with rule 4, dealing with service of a summons.[68]

The rule provides that the action shall be dismissed without prejudice as to the deceased party if a motion for substitution is not made within ninety days of the suggestion of death.[69] It is not necessary that a suggestion of death be made before a motion for substitution can be filed. Suppose *A* sues *B* and *B* dies. *A* does not have to suggest on the record the fact of *B*'s death before he can substitute *B*'s heirs or executor as the defendant. If a suggestion of death is filed, however, it must be served in the same manner as the motion, i.e., by service upon the lawyers

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[67] *See* Vandervelde v. Put & Call Brokers & Dealers Ass'n, 43 F.R.D. 14, 17 (S.D.N.Y. 1967) (merits of antitrust suit could not be determined upon motion to substitute).

[68] For example, *A* sues *B* and the latter dies while the action is pending. *A* wants to substitute either *B*'s heirs or *B*'s executor as the defendant. In order to obtain personal jurisdiction over *B*'s heirs, the heirs must be served with the motion and notice of hearing as provided by rule 4 as if suit initially had been filed against them.

In Ransom v. Brennan, 437 F.2d 513 (5th Cir.), *cert. denied*, 403 U.S. 904 (1971), the court of appeals confronted a fact situation similar to the one described above. The motion to substitute, served on the lawyer for the deceased rather than on the executrix, was granted by the district court. The district court subsequently denied the executrix's motion to dismiss for lack of personal jurisdiction. In reversing the district court, the Fifth Circuit noted that since the executrix was not a party within the meaning of rule 25(a)(1) and since she was not served with process pursuant to rule 4, the district court lacked the requisite personal jurisdiction over her. 437 F.2d at 515, 518.

[69] *See, e.g.*, Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1227 (D. Md. 1968) (supplementary opinion) (complaint dismissed as to deceased defendants when no motion to substitute their successors or representatives was filed within 90 days of suggestion of death), *aff'd in part and rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970).

for those already parties and in accordance with rule 4 for those not parties. Also, the general provisions of rule 6(b) apply to motions to substitute. Accordingly, the court may extend the period for substitution if timely requested. As rule 25 states, a suggestion of death is merely a statement of the fact of the death of a party filed with the clerk.

Subparagraph (a)(2) provides that, in the event of death of one or more of the plaintiffs or of one or more of the defendants, the action does not abate when the right sought to be enforced survives only to the surviving plaintiff or against the surviving defendant. Suppose, for example, a husband and wife owned their home as joint tenants with right of survivorship and they bring an action against *X* to quiet title to the property. Subsequently, the husband dies. Under subparagraph (a)(2), the action will continue in the name of the wife since she is now the sole owner of the property. Subparagraph (a)(2) provides that the death of the party shall be suggested on the record and the action shall proceed for or against the surviving parties.

Subsection (b) of the rule simply provides that the procedure for substitution after a party comes under a legal disability is the same as the procedure for substitution following death. The legal representative of a non compos mentis, for example, can be substituted for the incompetent, and the action can proceed as if the representative were the original defendant or plaintiff.

Subsection (c) deals with transfers of interest after an action has been commenced. This situation would arise, for example, when *A* sues *B*, seeking to establish an interest in a parcel of land owned by *B*, and after the suit is filed, *B* conveys the land to *C*. It would also arise when *A* brings a personal injury suit against *XYZ* Corporation, and, after suit is filed, *XYZ* merges with Ajax, Inc., the surviving corporation being Ajax. In both of these situations, the suit can proceed against the original defendant, and the transferee will be bound by the judgment, even though no substitution occurs. In short, subsection (c) of the rule *permits* a substitution of parties under these circumstances, but it is not required. If a substitution motion is made, it is to be made in the same manner as the motion for substitution following the death of a party. Since subsection (c) is wholly per-

missive, there is no time limit on moving to substitute under its provisions.

Subsection (d) of the rule deals with the death or separation from office of public officers. For example, suppose suit is brought in the name of the three elected officials comprising the Mississippi Public Service Commission. While suit is pending, one of them dies or fails to be reelected. Subsection (d) provides that the action does not abate and the successor is automatically substituted as a party.[70] Subsection (d) also provides that an order of substitution may be made at any time, but the failure to enter such an order shall not affect the substitution. The term "public officer" is a broad one and includes state, county, and city officials, agency heads, and officials of the federal government.[71]

Finally, subsection (d) provides that proceedings following substitution shall be in the name of the substituted officer, but any misnomer not affecting the substantial rights of the parties shall be disregarded. This portion of subsection (d) simply recognizes that it is the officer (or the office he holds) that is the real party in interest, not the individual who happens to occupy the office at the time. Thus, the failure to make the substitution properly, or to make it at all, shall not affect the prosecution of the suit.

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[70] *See* New Orleans Terminal Co. v. Spencer, 255 F. Supp. 1, 9 (E.D. La. 1965) (where election intervened between trial and filing of opinion, the newly-elected parish officials were automatically substituted as defendants in suit pending against predecessors), *rev'd on other grounds*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967).

[71] *See* 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1960, at 677 (discussion of substitution of public officials).

Rule 25 not only applies when *A* succeeds *B* in a particular office and is thereby substituted, but also when a particular function of one office is transferred to another office. *See* Wright v. County School Bd., 309 F. Supp. 671, 676-77 (E.D. Va. 1970) (by succeeding to powers of county school board, city officials were substituted as defendants in desegregation suit), *rev'd on other grounds sub nom.* Wright v. Council of the City of Emporia, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972).

For instance, if the authority to control pollution from oil wells is transfered from the Air and Water Pollution Control Commission to the Oil and Gas Board and a suit has been filed in the name of the Air and Water Pollution Control Commission, under the broad interpretation of the rule followed in the federal courts, the Oil and Gas Board would be automatically substituted as the party plaintiff.

Conclusion

This article is intended to give the reader an introduction to the rules discussed herein and nothing more. A more thorough understanding of their use and application will readily come as they are applied in practice. Although they are unfamiliar to many, there is nothing mysterious or esoteric about the new Rules. In many respects they are much simpler and more workable than our prior rules of practice and procedure. Moreover, there is an enormous body of law interpreting the federal rules, which are very similar to those adopted for our use in state courts. The adoption of these Rules brings Mississippi in line with at least forty other states that have adopted rules of procedure patterned after the federal rules. Given time, I believe we will all come to appreciate the wisdom and practicality of this action.

PRETRIAL PROCEDURE, APPLICABILITY OF RULES, and JURISDICTION AND VENUE—RULES 16, 81, and 82

*William H. Bizzell**

I. Rule 16—Pretrial Procedure

Rule 16, which provides for pretrial conferences, will be familiar ground for most Mississippi attorneys. Its provisions are comparable to our statutory pretrial procedure,[1] which has been in effect for almost ten years. Also, our new rule 16 is not substantially different from federal rule 16.

Our new rule 16, like our former statute, differs from its federal counterpart in that it does not authorize the judge to call the pretrial conference in his sole discretion. The judge may call the conference only on motion of one of the parties; he must call it on motion of all the parties. The Advisory Committee accepted this limitation on the authority of the judge out of deference to very strong objections voiced throughout the state to some federal court pretrial practices. As pointed out in the comment to our rule 16, these conferences can be burdensome and time-wasting if not approached with care and imaginative planning.

The list of items to be considered at the conference varies somewhat among the new rule 16, the former statutory rule, and the federal rule. The differences, however, are not significant. The new rule includes as a final item "such other matters as may aid in the disposition of the action," so that there is actually no restriction on what the judge and counsel may consider in the conference.

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[1] Miss. Code Ann. § 11-1-6 (Supp. 1981).

The nature of the pretrial conference, and its ultimate value, will vary depending upon the time and effort that the judge and counsel are willing to put into it. The saving of time will usually be more obvious in jury than in non-jury cases. A practice of pretrial conferences in domestic relations and other non-jury actions could be quite worthwhile, however, although the pretrial conferences would be less formal and less detailed than pretrial conferences for jury cases.

The conference can be most effective only if a pretrial order grows out of it, complete enough so that the trial may proceed on the basis of the order and with little or no reference to the pleadings. Form 34 with our Rules, which covers pretrial orders, is a relatively limited form. For the attorney not familiar with pretrial, the beginning point should be to study some actual pretrial orders, which can be borrowed from a fellow attorney or found in the court files in the office of a circuit clerk or federal clerk.

The conference should not be held until pleadings and discovery are substantially complete. It should be held far enough ahead of the trial date so that a pretrial order can be prepared by the counsel designated and submitted to opposing counsel, with differences worked out, and can be finally submitted to the judge ahead of the trial date. Our rule 16 adopts twenty days as a minimum time for this purpose.

Lead counsel for each party should attend the conference. If he is unable to do so, there should be present an associate who is completely familiar with the case and who is authorized to bind the client.

Counsel for all parties should meet well in advance of the scheduled conference and reach agreement on all possible matters. Experienced counsel will have largely prepared the pretrial order, or his version thereof, before the conference is held. Previous practice has shown that some judges, because of a shortage of judicial time, often rely upon counsel to prepare a pretrial statement by following a form designated by the court. The statement is then merely submitted to the judge, without his actual attendance at a conference. Recording the conference, or at least the significant agreements and decisions growing out of it, will assist in preparing the pretrial order.

The following modifications of rule 16 should be given consideration:

(1) Allow the trial judge to call pretrial conferences, whether or not requested by counsel.
(2) Remove the requirement that the conference be held twenty days before trial so as to give the court more flexibility in scheduling. The twenty day period is certainly not necessary in the non-jury case or other simple case in which no pretrial order is contemplated.
(3) Clarify subsection (f) of rule 16 as to expert witnesses, so that it will not conflict with the provisions of rule 26(b)(4).

Every court should make a serious effort to develop pretrial practices as a valuable tool in disposing of litigation. Those individuals experienced in the field have testified that properly prepared and conducted pretrials can encourage early preparation for trial, help each lawyer and the judge to better understand the issues of fact and law, dispose of or simplify many issues and problems in advance, avoid last minute delays on the day of trial, and further the negotiation of fair and better advised settlements of claims.

II. Rule 81—Applicability of Rules

The Mississippi Rules of Civil Procedure are designed for the determination of adversary claims between litigating parties. Some court proceedings are not strictly adversary in nature and hence do not fit the Rules. Others are highly specialized and are conducted by means of special proceedings. Rule 81 recognizes these proceedings and retains the unique practices and the special statutes followed in them, but makes the Rules applicable otherwise. The major impact of rule 81 will be on probate proceedings, and, to a lesser degree, domestic relations proceedings, in the chancery court.

Section (a) of the rule lists nine actions or groups of actions in which statutory procedures will continue to be followed. *Specific* statutory procedures control, but where there is no specific procedure, the Rules will apply. This section is modeled upon

section 11-5-7 of the Mississippi Code, in which the statutory procedures in probate, minors' business, and mental commitments were coordinated with traditional equity procedures. Each of the rule 81(a) actions will be examined later in this comment.

Section (b) is modeled closely on section 11-5-49 and is a recognition of the non-adversary nature of many proceedings; these are usually characterized by being initiated by petition or application and without a named adversary. These proceedings will be affected little by the Rules.

Section (c) permits service of process, as provided for by rule 4, in lieu of any statutory summons or publication requirement. In particular, summons by certified mail or by process server will be available out-of-state in lieu of publication.

Section (d) applies to certain special domestic relations procedures (temporary relief, modification, and enforcement), and makes clear that they do not require either the full pleading or the time requirements for original complaints.

Section (e) makes no substantive change in the law as to the special writs named, but provides that the relief heretofore obtained by use of such writs may be obtained instead by the filing of a simple action under the Rules, or by motion for such relief in an action already pending.

Section (f) contemplates our using the terminology of the Rules in all cases. When other terms appear in statutes or elsewhere, they shall be taken to mean the comparable procedure or device created by the Rules.

The significant words of rule 81(g) are: "When no procedure is specifically prescribed, the court shall proceed in any lawful manner . . . ." This means that problems that may arise in applying the Rules, as well as conflicts between the Rules and statutes, need not bring the trial court to a halt; it may follow any reasonable procedure that provides the fundamentals of due process. If the court does this, even though it makes some procedural error, rule 61 assures us that the matter will not be reversed unless substantial justice was denied. This should be a comforting provision to court and counsel alike during the time we are becoming familiar with the Rules and until conflicts, gaps, and unworkable provisions have been changed by the supreme court.

Following is a review of the applicability of the Rules to the rule 81(a) actions, with particular attention to the probate and domestic relations sections. These will be the ones most frequently encountered by the general practitioner.

A. Executors and Administrators, Guardians and Conservators

In probate matters, the effect of the Rules will be very limited as most procedure is detailed in the statutes. In addition, the relief sought is customarily upon petition rather than upon complaint, and most actions are not adversary. In the event adversary proceedings develop, such as heirship contests, will contests, and will constructions, any rules pertinent to such adversary proceedings will come into play. This procedure is in accord with section 11-5-49 of the Mississippi Code, which provides that when controversy arises, the court may direct plenary proceedings.

For an example of a probate matter under the Rules, we will examine the administration of a decedent's estate. Pleadings used heretofore will be changed very little. The original petition, either for probate of a will or to open an intestate administration, probably should continue to be signed by the applicant himself, and it will need to be signed by the attorney under rule 11. The petition need not be sworn. Otherwise, our present forms will suffice. Likewise, it appears that the following instruments will usually be unaffected by the Rules: the oath of the fiduciary; the surety bond, if any; proof of will; letters testamentary or of administration; notice to creditors; probate of claim (statute requires to be sworn);[2] inventory (statute requires to be sworn);[3] accounting (statute requires to be sworn);[4] the final petition to close (the statute requires it to include or be accompanied by a sworn list of the heirs or the devisees and legatees);[5] and the final judgment, unchanged except as to its title.

Any process required will be governed by rule 4. Most pro-

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[2] *Id.* § 91-7-149 (1972).
[3] *Id.* § 91-7-93.
[4] *Id.* § 91-7-277.
[5] *Id.* § 91-7-293.

bate procedures designate the period of time a notice or summons must be served in advance of hearing—the usual period is five days. Statutory provisions for sale of land of a decedent[6] and for sale of land by a guardian[7] require notice but do not specify a time period. Heretofore we have assumed that the general five-day requirement for vacation process[8] would apply in any such case. Under authority of rule 81(g), and depending upon the protection of rule 61, we should continue to recognize the traditional five-day requirement for such notice.

In planning for five days notice of any hearing, it should always be noted that rule 6(a), excluding Saturdays, Sundays, and holidays, will require at least seven actual days.

Final accounts will continue to require the statutory delay period of thirty days after completion of process. When publication is necessary, computation of the time period will now be different. Under rule 4, service by publication is complete on the day of the third publication, rather than seven days later as under the publication statute.[9] Accordingly, when publication is necessary on a final account, the first publication will need to be only forty-four days ahead of the hearing date, rather than fifty-one days as under the statute.

Waivers of process are provided for under rule 4, but with two major differences: (1) the rule omits our statutory provision for waiver by a guardian or other fiduciary;[10] the supreme court will undoubtedly be requested to add such a provision; (2) rule 4 merely requires that the waiver be executed after the commencement (filing) of an action, rather than on a day after the day of filing as under the statute. It will be good practice to continue waiting until a later day for procuring a waiver, so that the record will reflect affirmatively that the waiver was executed after filing. If done on the same day, then counsel should be careful to have the record reflect the exact time of filing the complaint and the exact time thereafter at which the waiver is

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[6] *Id.* § 91-7-197.

[7] *Id.* § 93-13-51 (Supp. 1981).

[8] *Id.* § 9-5-99 (1972).

[9] *See id.* § 13-3-19 (publication deemed completed at end of 21 days from date of first publication).

[10] *Id.* § 13-3-71.

actually signed and sworn to or acknowledged. This is of critical importance, since a waiver will probably be held void if executed in advance of the filing.

B. Divorce and Annulment

There are a number of specific procedural provisions in the Mississippi Code that will continue to control the resolution of divorce and annulment actions.[11] Except for these statutory provisions, practice and procedure in divorce, annulment, and separate maintenance actions will generally follow the Rules. A plaintiff (rather than a complainant) will file a complaint for divorce (rather than a bill of complaint). A general affidavit is not required by the Rules, but the non-collusion affidavit required by statute[12] will still be necessary. Otherwise the complaint can follow our present form and content for beginning a divorce action. The answer, the counterclaim for divorce (rather than cross-bill), the judgment of divorce (rather than decree), and remaining trial procedures will be governed by the Rules.

If a waiver is signed, the cause may be heard at any time thereafter so long as it is during a term of court. If process is required and no answer is filed, thirty days must elapse before the matter can be heard. The judge may proceed to set and hear the matter if the thirty-day period expires during a term of court, so long as there is compliance with rule 40 and local rules with reference to setting of causes and notice thereof.

Although the court cannot enter a default *judgment* in di-

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[11] The principal provisions of the Mississippi Code controlling divorce and annulment procedure are:

§ 93-5-2 No-fault procedure
§ 93-5-7 No default judgments; admissions are not evidence; case docketed only on request; cause for divorce in statutory language; liberal continuances; non-collusion affidavit
§ 93-5-11 County of filing
§ 93-5-17 Heard in open court at term; dismiss on application of plaintiff; temporary hearings
§ 93-5-23 Continuing jurisdiction to modify and enforce
§ 93-5-33 Statistical information in complaint
§ 93-7-7 Continuing jurisdiction to modify
§ 93-7-11 Procedure same as divorce

[12] MISS. CODE ANN. § 93-5-7 (Supp. 1981).

vorce matters, it would appear to be proper for the clerk to enter a default under rule 55(a); the default merely constitutes a clear record that the defendant has failed to "plead or otherwise defend."

Under rule 40, each court will determine its own manner of setting causes for trial. Most courts will undoubtedly continue to follow procedures similar to those now used. Rule 40(b) is an awkward administrative provision, which court clerks may not be able to follow in detail, and which it is hoped the supreme court will repeal.

Rule 81(d) provides that hearings for temporary relief, for enforcement by contempt or otherwise, and for modification will follow motion practice. This means that the relief can be sought by a motion, although calling it a petition should not be objectionable. It should be noted that rule 7(b) requires that a motion state the grounds of the motion with particularity and state the relief sought. This means that judges will continue to expect the same clear statement of grounds for these motions as they now expect for each of these three proceedings. Temporary relief may of course be demanded in the complaint, and notice or summons for the temporary hearing may be included with the original summons.

Under motion practice, five days notice must be given to the attorney of record, or, if none, then to the party himself. The computation of time under rule 6(a) will, of course, mean at least seven days total time.

Setting of hearings on motions, as with other vacation practice in the chancery courts, will vary among courts. The court may establish a regular motion day[13] and may authorize counsel to notice the hearing of motions for that day. In the alternative, the court or its clerk or secretary may set each matter on an individual basis. Temporary support hearings and enforcement hearings will fit well into motion day practice. Modification hearings may require special attention; they probably should be set only after some consideration of both the time needed by respondent to prepare for the hearing and the time to be required for the hearing itself.

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[13] MISS. R. CIV. P. 78.

C. Other Title 91 Matters

Except in the chapter on executors and administrators (91-7), there are few procedural provisions in Title 91. The principal areas containing procedural provisions are heirship proceedings,[14] nuncupative wills,[15] and renunciation of wills.[16] In each instance, statutory provisions will be followed and procedure otherwise will be governed by the Rules.

D. Other Title 93 Matters

Paternity is governed generally by the Rules. Statutes control, however, as to who may file,[17] limitation periods,[18] plaintiff's right to choose the court,[19] the defendant's right to demand a jury trial,[20] venue,[21] perpetuation of testimony,[22] use of blood tests,[23] content of the order,[24] security for payment,[25] and commitment for contempt.[26]

Although the statutes provide for beginning with a petition and concluding with an order, a paternity proceeding is a serious adversary proceeding, affecting rights of a child and determining future inheritance by and through the child and the father. Accordingly, it should not be considered a summary proceeding. Rather than enter a default judgment under rule 55, the court should allow thirty days to answer and require proof.

Reciprocal support proceedings when Mississippi is the initiating state[27] are completely statutory, except that the term "complaint," rather than "bill of complaint," should probably be used. When Mississippi is the responding state, the Rules should

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[14] MISS. CODE ANN. §§ 91-1-27 to -31 (1972).
[15] *Id.* §§ 91-5-15 to -19.
[16] *Id.* §§ 91-5-25 to -29 (1972 & Supp. 1981).
[17] *Id.* § 93-9-9 (Supp. 1981).
[18] *Id.* §§ 93-9-9, -13.
[19] *Id.* § 93-9-15 (1972).
[20] *Id.*
[21] *Id.* § 93-9-17.
[22] *Id.* § 93-9-19.
[23] *Id.* §§ 93-9-21 to -27.
[24] *Id.* § 93-9-29 (Supp. 1981).
[25] *Id.* § 93-9-31 (1972).
[26] *Id.* § 93-9-33.
[27] *See id.* § 93-11-5 (initiating state defined as state where proceedings began).

be followed except for the very limited procedural provision in the chapter. Actions under section 93-11-65, the general custody and support statute, will follow the Rules. Actions under section 93-11-67, long-arm child support, must follow the statute very closely in the allegations of the complaint or petition and in service of process since those provisions are not merely procedural but are necessary for jurisdiction. Otherwise the action will follow the Rules.

Termination of parental rights proceedings[28] and adoption proceedings[29] each begin with a petition (a sworn petition in adoptions). The statutes largely control procedure if the matter is uncontested. The form and content of the summons should follow the Rules. If a contest develops, pleading and procedure will generally follow the Rules.

Section 93-17-1, covering the alteration of names and the legitimation of offspring, provides for beginning the action by petition. The action will be handled summarily if all necessary parties join and there is no contest. If some necessary parties do not join, summons and proceedings thereafter will follow the Rules.

The proceeding for removal of a disability[30] begins with an application or petition. It may be heard summarily if necessary parties join and there is no contest. Procedure for this action is largely statutory, although summons for a necessary party not joining will be effected under the Rules. In the event of a contest, the Rules will come into play. Section 93-19-11 provides that a married minor is not disabled in marital matters. Since this section involves definition of disability, and not mere procedure, the statute controls over rule 17(c). Rule 4(c)(1) for serving summons on a married minor is in accord.

E. Miscellaneous Proceedings

The statutory procedures for habeas corpus,[31] bond valid-

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[28] *See generally id.* §§ 93-15-101 to -111 (Supp. 1981).

[29] *See generally id.* §§ 93-17-1 to -67 (1972 & Supp. 1981).

[30] *See generally id.* §§ 93-19-1 to -13.

[31] *See id.* §§ 11-43-1 to -55 (procedures for writ of habeas corpus).

tions,[32] commitment of alcohol and drug addicts,[33] and commitment of the mentally ill and mentally retarded[34] are rather detailed. Unless a statute clearly indicates otherwise, summons will follow rule 4 and time computation should follow rule 6(a). Normally there will be little resort to other rules.

The Rules are not directly applicable to attorney disciplinary proceedings[35] since they are not held in the trial courts that are subject to the Rules. Section 73-3-307 gives, however, disciplinary agencies certain powers equal to those exercised by courts of record. This section thus requires reference to the Rules to determine the procedures for exercising those powers.

Procedures in youth court are very complete.[36] Except for computation of time as set forth in rule 6(a), the Rules will generally not apply. Similarly, rule 1 apparently excludes the family court from application of the Rules. Even if the Rules should apply, the detailed procedures for the family court[37] leave little reason to resort to them.

Procedures for primary election contests are detailed and are summary in nature.[38] There should be little room for application of the Rules except with regard to such items as motions, subpoenas, and service of pleadings. However, actions contesting the election of county officers or district attorneys[39] will, except for very limited procedural provisions, be governed largely by the Rules.

The Rules seem to contemplate that the eminent domain court[40] will come within their purview. The statutory procedures

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[32] *See id.* §§ 31-13-1 to -11 (procedures for bond validations).

[33] *See id.* § 41-30-27 (Supp. 1981) (emergency involuntary commitment); *id.* §§ 41-31-1 to -23 (1972 & Supp. 1981) (procedures for commitment).

[34] *See id.* § 41-19-41 (1972) (procedures for commitment); *id.* §§ 41-21-61 to -107 (1972 & Supp. 1981)(statutes concerning persons in need of mental treatment).

[35] *See id.* §§ 73-3-301 to -373 (Supp. 1981) (procedures to discipline and to determine personal incapacity to practice law).

[36] *See id.* §§ 43-21-101 to -651 (operation of youth court).

[37] *See id.* §§ 43-23-1 to -55 (1972 & Supp. 1981) (operation of family court).

[38] *See id.* §§ 23-3-45 to -55 (1972) (primary election contests).

[39] *See generally id.* §§ 23-5-187, -189. A jury trial is provided in such actions. *Id.* § 23-5-187.

[40] The eminent domain court is a special court. *See id.* § 11-27-3 (creating court of eminent domain).

in this area are rather detailed,[41] however, and there will be very little application of the Rules except for form and service of summons, subpoenas, motions, and computation of time. Chapters 51-29 and 51-31 of the Mississippi Code provide for taking land for drainage purposes and assessing benefits and damages. The chancery court is given the power to hear and determine objections in such actions. These are largely statutory procedures and will be little affected by the Rules.

F. Rule 64 Remedies

Rule 64 lists several remedies for seizure of property and provides that they are available "under the circumstances and in the manner provided by law." Hence, statutory procedures will be followed. These actions are not, however, excepted from the Rules. They impliedly will be treated like rule 81(a) actions since, when the need arises to take some action not detailed in the statute, the Rules will be followed.

III. Rule 82—Jurisdiction and Venue

There are no substantial changes or serious problems created by rule 82. Section (a) of the rule makes it clear that jurisdiction of the courts is not affected. The jurisdictions of our circuit and chancery courts, provided for in the constitution, are unchanged. Substantive rules of law and principles of equity, and the remedies available to each court, are not affected by the Rules.

There have been expressions of concern that the new methods of obtaining process under rule 4 might affect jurisdiction of a court. This may grow out of a confusion of the term "personal service of process" and the term "personal" or "in personam" jurisdiction. We know that personal service of process on a defendant who lives in and is served in our county will give jurisdiction to enter a judgment binding personally upon him. But the same personal service of process upon a defendant who lives in and is served in another state will ordinarily not give jurisdiction over his person, and hence any judgment will not be bind-

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[41] *See generally id.* §§ 11-27-1 to -91 (1972 & Supp. 1981).

ing personally upon him. Likewise, under rule 4, mailing of a summons to a non-resident or service of summons by a process server in another state will give us no more personal jurisdiction over the defendant than we obtained by using publication in the past.

Section (b) provides that venue will continue to be governed by existing statutes. The primary venue statute for circuit courts is section 11-11-3, together with the following sections. The primary venue statute for chancery courts is section 11-5-1. Scattered throughout the Code are other provisions covering where particular actions should or may be brought. The Rules do not change them.

Section (c) makes no substantial change in our present practice, that of allowing filing in the county of the residence of any material defendant against whom any material claim is made.[42] Since the Rules are more liberal than existing law in allowing joinder of claims and joinder of parties, a broader selection of venue will sometimes be available to the plaintiff than in the past. The basic rules, however, are unchanged.

Section (d) provides that if an action is filed in the wrong county, it shall on timely motion be transferred to the proper county rather than be dismissed. This follows the provision of section 11-11-17. Expenses of transfer will be borne by the plaintiff; presumably this includes only court costs and not any personal expenses of parties or counsel. If there should be more than one county to which the action may be properly transferred, the plaintiff may select the county. This is proper since the choice of the court would have been his in the first instance.

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[42] *See id.* § 11-5-1 (1972) (venue in chancery court); *id.* § 11-11-3 (venue in circuit court).

DISCOVERY—RULES 26-34, 36, and 37

*Jack F. Dunbar**

Introduction

The Mississippi Rules of Civil Procedure provide for notice pleading. As opposed to the historical practice of pleading facts, notice pleadings simply assert general conclusions that support a claim for relief.[1]

The factual bases for the conclusions of the pleadings are determined through discovery. The discovery process, along with the pretrial conference,[2] constitute the mechanism by which the real issues, both factual and legal, are determined in any lawsuit. Thus, discovery ultimately prevents trial by ambush, eliminates unnecessary trial time and the resulting expense to the parties, and forecloses the opportunity to obscure the real issues by the injection of irrelevant material at trial.

Factual issues are resolved in any trial by evidence; evidence consists solely of the testimony of people and the review of tangible things. People and things are all we deal with in court. Therefore, in order to engage effectively in the discovery process, it is important to understand the extent to which this evidence is discoverable, and how to discover it.

Rules 26 through 37 govern discovery. The Mississippi discovery rules were influenced by the Federal Rules of Civil Procedure, but the two sets of rules are by no means identical. Indeed, the Mississippi rules are unique in some particulars. Generally, rule 26 deals with the scope of discovery, rules 27 through 36 with the mechanics of discovery, and rule 37 with sanctions for noncompliance with the rules. There is no rule 35.

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*Partner, Holcomb, Dunbar, Connell, Merkel, Tollison & Khayat, Oxford, Mississippi; B.A. Honors, 1954, Millsaps College; J.D., 1957, University of Mississippi.

[1] *See* Miss. R. Civ. P. 8(a) comment (purpose of pleading "to give notice, not to state facts and narrow the issues").

[2] *See id.* 16 (pretrial procedure).

I. RULE 26—GENERAL PROVISIONS

The principal discovery tools are oral depositions, interrogatories, requests for production, and requests for admissions. They may be used tactically in any way desired by a party to a lawsuit, within the guidelines set forth in the Rules.[3]

In general, any matter relevant to the issues is discoverable. Discovery is subject, however, to certain limitations. Privileged matter is never discoverable, and the discovery of work product, including expert testimony, is qualified. In addition, the court may limit the scope of discovery pursuant to a discovery conference or protective order.[4]

The scope of discovery specifically includes the ability to obtain knowledge of the existence and location of tangible things and of the identity and location of persons having knowledge of discoverable matter.[5] While discovery is confined to matter relevant to the issues, a party may not object on the grounds that the information sought will not be admissible at trial so long as the requested discovery appears reasonably calculated to lead to the discovery of admissible evidence.[6]

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[3] *See, e.g., id.* 33(a) (imposing a 30-question limit on interrogatories). The court may issue a protective order under rule 26(d) or restrict discovery following a discovery conference under 26(c).

[4] *Id.* 26(c). Rule 26(b)(1) is "intended to favor limitations, rather than expansions, on permissible discovery." *Id.* 26 comment. The rules are intended to limit discovery to the "specific practices or acts that are in issue." *Id.*

[5] Rule 26(b)(3) allows the discovery of documents and tangible things prepared for trial, exclusive of "mental impressions, conclusions, opinions, or legal theories." The ability to obtain the identity and location of persons and things is important when considering the work product rule. *See infra* notes 10-22 and accompanying text (work product).

[6] MISS. R. CIV. P. 26(b)(1). The federal rules contain the same provision that discovery may include inadmissible matters. *See* FED. R. CIV. P. 26(b)(1) (inadmissible discovery).

The federal rules limit the scope of discovery to the subject matter of the proceeding rather than to the issues raised by the parties. *Id.* 26(b). The use of the word "issues" as opposed to "subject matter" in the Mississippi rules was intended to restrict the scope of discovery. *See* MISS. R. CIV. P. 26 comment (rule 26(b)(1) narrows the scope of discovery); *cf.* ABA, REPORT OF THE SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE 3 (1977) ("discovery should be limited to the specific practices or acts that are in issue") [hereinafter cited as ABA REPORT]. The use of the term "issues," however, leads to a result that is, indeed, a paradox. The real issues in a case are not generally clearly developed except through discovery. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2008 (1970 & Supp. 1980) (often issues are not clearly defined at time of

A. *Insurance Agreements*

Insurance agreements are treated specially. Arguably, insurance agreements are not relevant to any issue in a controversy. Many maintain, however, that the existence of insurance is realistically and practically relevant to the outcome of a case, since insurance often leads to settlements. In addition, it is argued that the realities of litigation require that knowledge of insurance coverage be discoverable.[7]

Rule 26(b)(2) is a compromise and provides that one may discover the existence and contents of an insurance agreement. This information, however, is not admissible into evidence merely by reason of disclosure under 26(b)(2),[8] but the agreement may, for other reasons, be admissible into evidence.[9]

B. *Work Product*

Work product, or trial preparation materials, is included in perhaps the most misunderstood provision of all the rules of discovery. This is the area where disputes most frequently arise.[10] Proper understanding of work product is essential to the proper use of discovery. If one fully understands rule 26, then one has mastered discovery. It would be worth the practitioner's time to read the material in Wright & Miller,[11] Barron & Holtzoff,[12] and

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discovery; one purpose of discovery is to identify and narrow issues).

As the Mississippi rule is written, discovery is limited to issues, when, in fact, discovery is intended to determine issues. The desire to limit discovery and prohibit its abuse can be accomplished in other and more effective ways. The discovery conference, for example, is specifically designed to prevent abuses and to limit discovery to the substantive matters in controversy. *See* MISS. R. CIV. P. 26(c) (discovery conference).

[7] *See* C. WRIGHT & A. MILLER, *supra* note 6, § 2010 (whether discovery concerning insurance should be allowed); Comment, *Pre-Trial Discovery of Existence and Amount of Defendant's Liability Insurance Policy*, 20 S.C.L. REV. 85, 87-92 (1968) (factors supporting view that discovery should be allowed); 6 CREIGHTON L. REV. 381, 383-85 (1973) (pretrial discovery of insurance allowed by Nebraska Supreme Court).

[8] MISS. R. CIV. P. 26(b)(2); *see* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 201 (E. Cleary 2d ed. 1972) (generally evidence of insurance coverage inadmissible).

[9] C. MCCORMICK, *supra* note 8, § 201.

[10] *See* 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 652 (rev. ed. 1961) (work product is "[p]robably the most troublesome question relating to the scope of discovery").

[11] 8 C. WRIGHT & A. MILLER, *supra* note 6, § 2021.

[12] 2A W. BARRON & A. HOLTZOFF, *supra* note 10, § 652.

Moore's Federal Practice[13] on these sections.

Work product should not be, but often is, confused with the attorney-client privilege. Any privilege, attorney-client or otherwise, is sacred. Work product, on the other hand, is not. It is at best a qualified immunity. While the attorney-client privilege deals with communications between attorney and client, work product includes only documents or things, not communications. If it is not a document or thing that you are dealing with, it cannot be work product.

The work product doctrine was best enunciated by the United States Supreme Court in *Hickman v. Taylor*.[14] Work product is really a doctrine of fairness. It is unfair for one who has investigated and developed his documents and things to be required to turn those items over to the opposing party who could have expended the same time and effort and obtained substantially the same result.

On the other hand, the interests of justice require that relevant matter be discoverable so that it will be available for consideration by the trier of fact. The work product rule is thus a compromise between these two desired ends.

Documents and things are not defined as work product unless they have, in fact, been prepared in anticipation of trial and not for other routine purposes. If they have been prepared in anticipation of litigation, an immunity attaches. This immunity is qualified; if the items are relevant to the issues and if the opposing party cannot obtain the equivalent information without substantial hardship, then the items are discoverable.[15]

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[13] 4 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26.64 (rev. 2d ed. 1948).

[14] 329 U.S. 495 (1947). The Court stated that a lawyer's work is discoverable only upon a showing of "necessity or justification." *Id.* at 510. The burden of showing such necessity or justification is upon "the one who would invade that privacy." *Id.* at 512.

[15] One might be entitled to such statements, however, if he could show that he could not obtain the substantial equivalent by his own efforts. What about statements taken immediately following an event that occurred several years ago? Because of memory difficulties, can one really obtain the substantial equivalent of the witnesses' memory recall now, several years after the event? What about photographs taken at a scene immediately following an event showing conditions then as opposed to conditions three years later? Can the substantial equivalent be obtained by any means at the present time? Obviously, the answer lies in the particular facts of each case. *See* 8 C. WRIGHT & A. MILLER, *supra* note 6, § 2028 (discussing the diversity of positions taken by the courts).

It is also important to note that, even though a document or thing is work product and therefore may not be obtained from the opposition, the existence and location of such documents and things are always discoverable.[16] In other words, you can always discover "who" and "what" is out there. You may have to

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Application of the principles enumerated in the work product rule has resulted in many diverse results. *Compare* Jarvis, Inc. v. AT&T Co., 84 F.R.D. 286, 293 (D. Colo. 1979) (matters investigated by AT & T may have been work product but were discoverable where plaintiffs demonstrated that the material was relevant and not available through other means of discovery) *and* Xerox Corp. v. IBM Corp., 79 F.R.D. 7, 9-10 (S.D.N.Y. 1977) (statements given by defendant's employees to defendant's in-house counsel held discoverable after proving that alternative means of discovering information were unavailable) *and* Terribery v. Norfolk & W. Ry., 68 F.R.D. 46, 47-48 (W.D. Pa. 1975) (where crewmen were only living witnesses to train collision and admitted that they could not recall certain facts regarding the accident, statements made immediately after accident to defendant were discoverable) *and* Clover v. Walters, 51 F.R.D. 288, 289 (S.D. Ala. 1970) (affidavit of plaintiff's attorney noting existence of statement taken by defendant immediately following accident and asserting that this information could not be duplicated constituted sufficient showing of substantial need) *with In re* Thompson, 624 F.2d 17, 19 (5th Cir. 1980) (both parties took statements of witnesses to accident at a time nearly contemporaneous with event, thus, no showing of requisite good cause for production) *and* First Wis. Mort. Trust v. First Wis. Corp., 86 F.R.D. 160, 166 (E.D. Wis. 1980) (facts insufficient to grant discovery of attorneys' notes of witnesses' statements where court uninformed, *inter alia*, as to number of witnesses, how long ago statements were taken, and whether witnesses would claim impaired memory) *and* Fidelity & Deposit Co. v. S. Stefan Strauss, Inc., 52 F.R.D. 536, 537 (E.D. Pa. 1971) (allegation that witness was former employee of defendant did not illustrate sufficient need and hardship to compel discovery where no timely attempt was made to interview or depose employee).

Some courts are more liberal than others. It's a judgment call, but a court is clearly authorized to permit the discovery if in fact what may be properly defined as work product cannot be obtained by the opposing party without undue hardship. Certainly, if the substantial equivalent cannot be obtained by any means, and if the matter is relevant to the issues, discovery should be allowed, since the rule states that work product may be discovered "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Miss. R. Civ. P. 26(b)(3).

[16] For example, an investigator may have taken the statement of a witness following the filing of a lawsuit. Since it was taken in anticipation of litigation, and since the opposite party may also contact the witness and obtain the same information, the statement itself, a document, is work product and is non-discoverable. On the other hand, the existence of the statement and the name and location of the person giving the statement are clearly discoverable under 26(b)(1). One can, therefore, always determine the names of those persons who gave statements, and the existence and location of the statements, even though one might not be entitled, under the work product provisions, to the documents themselves.

get those things and see those people yourself, but you can always find out from your opponent what exists and where it is located. Obviously, it would be impossible to know whether an item is work product unless you know it exists.[17]

If discovery is allowed, the court will always protect against the disclosure of the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative of a party concerning the litigation.[18] This protection can be provided by an in camera inspection of the disputed item by the court. Some portions may be blotted out if other portions are discoverable.

Written statements have a special treatment. A written or electronically-recorded statement is always obtainable by the person who gave the statement, whether or not he is a party to the suit. The declarant may give the statement or a copy of it to anyone. It is proper to ask any person who has previously given a statement for a copy. If he wants to give you a copy and does not have one, he may request a copy from the person originally securing the statement.

C. Experts

Experts are also a type of work product. Historically, an opinion was not subject to compulsory disclosure by subpoena. It was considered the property of the individual, and while he could sell it or give it away, he could not be made to part with it involuntarily. This rule was akin to the prohibition against depriving a person of his property without compensation or due process.[19]

Under the modern rule, if the individual decides to sell his opinion or give it away, the opposite party arguably is entitled to

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[17] *See* 329 U.S. at 507 ("mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").

[18] MISS. R. CIV. P. 26(b)(3); *see* Upjohn Co. v. United States, 449 U.S. 383, 399 (1981) (disclosure of attorney's notes of witness' statements is particularly disfavored, and the rule affords a special protection to work product revealing attorney's mental processes); Mervin v. FTC, 591 F.2d 821, 825-27 (D.C. Cir. 1978) (work product rule protects against disclosure of mental impressions, conclusions, opinions, or legal theories).

[19] *See generally* C. WRIGHT & A. MILLER, *supra* note 6, § 2032 (discovery of expert opinions).

know what the opinion might be so that he may better prepare his response and secure his own experts. The rule is based on fairness. Consequently, if experts are otherwise discoverable[20] and their opinions were acquired or developed in anticipation of litigation,[21] they may be discovered on a limited basis.

There are four general classifications of experts. The first includes the expert who has been retained and who is expected to testify. Through written interrogatories, one may discover the identity of this expert, the subject matter on which he is expected to testify, the substance of the facts and opinions upon which he will rely, and a summary of the grounds for each opinion. On motion, the court may permit other discovery, such as an oral deposition of the expert. The party requesting additional discovery, however, must fairly bear the expenses of the expert. These expenses include both those incurred in responding to discovery and those resulting from the expert's investigations and experimental activities.

The second classification includes the expert retained in anticipation of trial but not expected to testify. This type of expert can be discovered only upon a showing of exceptional circumstances. The party must show that because of the expert's special conduct or previous involvement with the case, he cannot obtain the equivalent information by any means other than the discovery of the expert.[22]

The third type of expert is one who has been consulted informally and is not expected to testify. Generally, this expert is not discoverable by any means.

The fourth type of expert is one who develops facts not in

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[20] "Otherwise discoverable" means that they are not privileged or otherwise not discoverable under rule 26(b)(1).

[21] By definition, this is the work product element.

[22] *See, e.g.*, Roesburg v. Johns-Manville Corp., 85 F.R.D. 292, 299 (E.D. Pa. 1980) (discovery permitted where information relevant and defendant did not suggest practical alternatives); Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122, 1136 (S.D. Tex. 1976) (enumerating "exceptional circumstances"); Sanford Constr. Co. v. Kaiser Aluminum & Chem. Sales, Inc., 45 F.R.D. 465, 466 (E.D. Ky. 1968) (discovery permitted where plaintiff's expert present and defendant's agent not allowed to be present when evidence moved, conditions had changed, and information could not otherwise be obtained); *cf.* Crockett v. Virginia Folding Box Co., 61 F.R.D. 312, 320 (E.D. Va. 1974) (substantial need for information not shown).

anticipation of litigation, but routinely on the job. He is not protected, and there is no immunity for this type of expert. He is discoverable, as is any other witness, provided that the area of inquiry is relevant to the case and is otherwise discoverable.[23]

D. Discovery Conference

The discovery conference is peculiar to the Mississippi Rules of Civil Procedure. Its purpose is to prevent abuse and to limit the scope of discovery where one party unnecessarily engages in prolonged or protracted discovery at great or unnecessary expense. The conference shall be held on request of either party, and a plan and schedule of discovery shall be developed by the court. The plan may set limitations upon discovery and may even allocate expenses between the parties as necessary for the proper management of discovery. The court may reconvene the conference from time to time and enter amendments or supplemental orders. Sanctions may be imposed upon any party failing to cooperate or to abide by the terms of the plan.

E. Protective Orders

Through a protective order, a party may obtain a restriction on discovery to prevent oppressive or improper discovery or to avoid undue expense. The restrictions include limitations on the methods and conditions of discovery. In addition, the court may order special treatment of such items as trade secrets and personal or confidential matters.

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[23] The phrase "otherwise discoverable" in 26(b)(4) makes reference to 26(b)(1), in which it is clearly stated that the scope of discovery does not include privileged matters. Consequently, a medical expert, whether secured in anticipation of litigation or not, who is covered by a medical privilege, is not subject to discovery unless the privilege has been waived. *See* Steward, *Waiver of the Physician-Patient Privilege Rule in Personal Injury Litigation*, 3 FORUM 16, 17-34 (1967) (discussing methods of waiving the physician-patient rule). It is suggested that if a party discloses his medical expert's opinions during discovery, he has probably waived the medical privilege for all purposes; *cf.* Knighton v. Knighton, 253 So. 2d 846, 847 (Miss. 1971) (injured plaintiff waived his patient-doctor privilege by putting on stand doctor who was in possession of plaintiff's hospital records and who used such records in giving his testimony); Butler v. State, 245 So. 2d 605, 606-07 (Miss. 1971) (defendant waived privileged communication statute where state was given benefit of results of mental examination and evaluation).

F. Sequence and Timing of Discovery

The parties may engage in discovery in any way they wish. It is suggested, however, that, in general, written interrogatories should be used first to determine who and what may be potentially discoverable, and to find where these persons or evidence are located. Once that information is known, the party can take the testimony of witnesses by oral deposition and can attempt to secure things through requests for production. Requests for production may also be used to obtain the right to examine or to enter premises for inspection.

Once documents or things are obtained, their authenticity can be the subject of forced stipulations through requests for admissions. This is all a matter of tactics and style, depending upon the decision of the party or attorney in each case.[24]

G. Supplementation of Responses

One must supplement prior discovery that requested the identity and location of persons who have knowledge of discoverable matters. Further, discovery calling for the identity of experts to be called as witnesses and for the subject matter of their anticipated testimony must be supplemented. Obviously, one should also supplement an answer that he later learns is incorrect.

There is no further duty to supplement except that either party may request supplementation of prior responses at any time prior to trial. This imposes a duty on the other party to supplement all discovery identified in the request. Request should be made in every case within thirty days of trial.

H. Further Comments on Rule 26

The rules of discovery are designed to be self-executing; the parties, through their attorneys, should be able to execute the

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[24] *See generally* Finman, *The Request for Admission in Federal Civil Procedure*, 71 YALE L.J. 371, 371-436 (1962) (discussing proper use and effect of request for admissions); Lay, *Plaintiff's Practical Uses of Discovery Techniques*, 9 PRAC. LAW. 43, 43-69 (Dec. 1963) (discussing various discovery tactics); *Developments in the Law—Discovery*, 74 HARV. L. REV. 951, 953-54 (1974) (tactical considerations concerning depositions upon oral examination).

entire discovery process without judicial involvement. Judicial intervention is activated through a motion to compel discovery, filed by a party whose requested discovery has been refused. It is also triggered by a motion for a protective order, filed when a person believes that the discovery sought is outside discovery's scope or is oppressive.

More often than not, judicial intervention results from a failure by one party to understand fully the scope and limitations of rule 26. Once rule 26 is mastered, everything else is purely "how to." The parties may agree to engage in discovery in any manner, at any time or place, and on any conditions. The time limitations imposed by the Rules, however, cannot be altered by agreement.

Discovery may be invoked simply by written notice of intended discovery to an opposite party. Notice may be served either personally or by mail and need not be filed with the court unless the discovery papers are to be used in the lawsuit.[25]

Consequently, interrogatories, accompanied by a certificate of mailing, may be served directly on a party. Neither interrogatories nor their answers need be filed with the court unless it is anticipated that they will be used at trial. If necessary, they may even be filed during the trial itself. The same is true for other forms of discovery.

Where a separate notice is required for discovery, such as for an oral deposition,[26] it is suggested that the better practice would be to file the notice with the court. If the notice is filed, and a motion for a compulsory order later becomes necessary, the record will reflect that the particular discovery was in fact requested.

While a notice is sufficient to invoke discovery between parties, a nonparty can be compelled to submit to discovery only by a subpoena.[27] Notice of the subpoena must be given to all parties to the lawsuit. If a subpoena duces tecum is required, a des-

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[25] *See* MISS. R. CIV. P. 5(d) (absent court order, discovery papers not required to be filed until used with respect to any proceedings).

[26] *Id.* 30(b)(1); *cf. id.* 31(a) (similar notice required of party desiring to take a deposition upon written questions); *id.* 27(a)(2), (b) (depositions before action or pending appeal).

[27] *Id.* 45.

ignation of the materials sought should be attached to the notice.[28]

II. Rule 27—Depositions to Perpetuate Testimony

Rule 27 allows perpetuation of testimony taken before an anticipated lawsuit is filed or pending an appeal. It must be shown that the witness' testimony is needed and that exceptional circumstances exist, such as the witness being terminally ill or about to leave the country.[29] There is some authority that rule 27 permits taking a deposition before an action is filed to determine whether a possible claimant in fact has a cause of action.[30] Most authorities, however, agree that this practice would be an abuse of rule 27.[31]

III. Rule 28—Persons Before Whom Depositions May Be Taken

The person to be deposed is sworn by anyone authorized to administer oaths where the deposition is taken. Once the oath is administered, the deposition has been initiated and may proceed as authorized. The person who gives the oath, and thereby initiates the discovery, may leave if not otherwise needed.

IV. Rule 29—Stipulations Regarding Discovery Procedure

Rule 29 gives the parties the option to make things easy and convenient for themselves and their clients by authorizing discovery in any manner upon which the participants may agree.[32]

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[28] *Id.* 30(b)(1).

[29] The petitioner seeking to perpetuate testimony must show that he expects to be a party to an action but is presently unable to bring it or cause it to be brought. *Id.* 27(a)(1); *see* 8 C. Wright & A. Miller, *supra* note 6, § 2072 (discussing rule); Pyle, Ott, & Rumfelt, *Mississippi Rules of Discovery,* 46 Miss. L.J. 681, 699-709 (1975) (previous Mississippi practice under Miss. Code Ann. § 13-1-227 (1972)).

[30] *See, e.g.,* Bowles v. Pure Oil Co., 5 F.R.D. 300, 303 (E.D. Pa. 1946) (deposition allowed before action is filed); C.F. Simonin's Sons, Inc. v. American Can Co., 26 F. Supp. 420 (E.D. Pa. 1939) (same).

[31] *See, e.g.,* 8 C. Wright & A. Miller, *supra* note 6, § 2071 (such practice would be abusive).

[32] John Fox used to say that you could write a check by chipping out the words on a brickbat and sending it through the bank—it's tough on the machinery, but it's a good

These agreements are subject only to the requirement that they not extend time limitations without court approval. The court may, however, make an order which supersedes any agreement.

Rule 29 has been interpreted to include not only agreements concerning procedure,[33] but also agreements as to the payment of the costs of discovery.[34] Further, notwithstanding the requirements of rule 32 as to admissibility of discovery, the parties may agree that a deposition will be taken for evidentiary purposes. Finally, parties may agree to the authenticity or admissibility of documents.[35]

Rule 29 is consistent with the policy enunciated in rule 1, which provides that "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every action."[36] It follows, therefore, that the courts will give effect to all stipulations and agreements that further that policy but will supersede by court order any stipulation violating that policy.[37]

V. Rule 30—Depositions on Oral Examination

A. General Provisions

Rule 30 represents a dramatic departure from previous state and present federal procedure and creates a procedure that is unique to Mississippi. It draws in large part from the report of the American Bar Association's Special Committee for the Study of Discovery Abuse.[38] The Special Committee sought to elimi-

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check. Likewise, the parties pursuant to rule 29 presumably could agree to chip out interrogatories on stone if they saw fit, especially since they are not necessarily filed with the clerk. [John H. Fox, Sr. was a Professor of Law at the University of Mississippi from 1932 until his death in 1965. Ed.]

[33] In Atlantic Leasing Co. v. General Outdoor Advertising, 4 F.R.D. 122 (S.D.N.Y. 1943), the court held that a discovery agreement that made reference to previous proceedings and orders that were not of record and were not before the instant court would complicate, rather than simplify, the present action. *Id.* at 123.

[34] *See* Liebert v. Netherlands Am. Steam Nav. Co., 2 F.R.D. 316, 317 (S.D.N.Y. 1942) (agreements for expenses allowed).

[35] 8 C. Wright & A. Miller, *supra* note 6, § 2091.

[36] Miss. R. Civ. P. 1.

[37] Advisory Committee Report, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 508-09 (1970) (rationale for amendments to rule 29).

[38] ABA Report, *supra* note 6, at 9-16 (discussing rule 30).

nate unnecessary expense in the discovery process by simplifying deposition procedures, by eliminating unnecessary stenographic and filing expenses, and by giving more options to the parties taking oral depositions.

Prior Mississippi practice provided, and federal rule 30 still requires, that depositions be taken with all parties present, recorded stenographically, and transcribed, unless all parties agree otherwise. The court might approve another method for deposition, but only upon a showing of special circumstances. Mississippi rule 30 provides that, without prior court approval, depositions may be noticed by any party and may be taken by nonstenographic means, for example, by electronic recording. Depositions may also be taken by telephone; the parties need not be physically present with the deponent when the deposition is taken.[39]

A defendant may institute discovery at any time after commencement of the action. The plaintiff, on the other hand, may not take a deposition until thirty days after service of process upon the defendant, unless the defendant himself has sought discovery within that time. Additionally, if the witness is about to leave the state or will otherwise be unavailable at the expiration of the thirty-day period, the plaintiff may take his deposition at any time. In such a case, however, the witness must have an opportunity to obtain counsel, or the deposition may not be used against him.

Nonparty witnesses may be compelled to give an oral deposition by subpoena or subpoena duces tecum. Notice must be given to the parties, and a list of materials sought to be discovered by subpoena duces tecum must be attached to the notice.[40]

Notice alone compels the attendance of party witnesses. The notice must be in writing and should provide the time and place for taking the deposition as well as the names and addresses of the persons to be examined. If the names of the per-

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[39] Rule 30 recognizes the modern advances in technology and the various devices now available to record verbal communications electronically with adequate safeguards to ensure reliability. *See* Miss. R. Civ. P. 30 comment (indicating reliability of such devices).

[40] The requirements and procedures for subpoenas are given in rule 45.

sons to be deposed are not known,[41] the notice should include a description sufficient to identify the deponent. The testimony may be taken by telephone without court approval. On motion of any party, however, the court may require the deposition to be taken in the presence of the deponent. Also on motion, the court may enlarge or diminish the time for taking depositions.

The notice may provide, without court approval, that the deposition be recorded by means other than stenography. If a party chooses this option, the notice must designate the manner of recording and preserving the deposition. On motion, the court may require that the deposition be taken by stenographic means. If the motion is made by a party, it should be addressed to the court in which the action is pending; however, if made by a proposed witness, the motion should be addressed to the court in the district in which the deposition is to be taken. Notice to a party may be accompanied by a rule 34 request for the production of documents and tangible things to be examined at the deposition.

If the deponent is a corporation, partnership, or association, the notice should describe with reasonable particularity the matters on which the examination is to be conducted. The organization must designate one or more representatives to testify in its behalf, and it may designate the particular area upon which each individual will testify. One may also take the deposition of a specified officer without requiring the organization to make a designation.

While a deposition generally must be taken in the county where the deponent is physically present, rule 29 permits the parties to agree that the deposition be taken at any place. The deponent must also agree to the location, since rule 30 gives a deponent the right to be deposed in his own county.

The deponent is examined by both direct and cross examination. A deposition is not automatically transcribed; it is transcribed only upon request of one of the parties and upon payment of the charges therefor.[42]

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[41] For example, if the party is a corporation, the party requesting discovery may not know which officer to depose.

[42] Stenographers or court reporters usually charge an attendance fee as well as a fee

Specific provisions are included for the party who has only a few questions to ask and who wishes to avoid the expense of physically participating in the deposition. Such a party may serve his written questions upon the party taking the deposition. These questions must be propounded to the witness, and his answers must be recorded verbatim.

Occasionally, a party may believe that a deposition is being taken unreasonably or in a manner that causes unnecessary oppression or embarrassment. In such a case, he may call a recess and make his objection to the court in which the action is pending. The deposition is suspended for the time necessary for the objecting party to make his motion to the court. Rule 37 sanctions are applicable to such motions.

B. Transcript

If a transcript is to be used in any proceedings in the action, it must be submitted to the witness for examination, unless both the parties and the witness have waived examination. The witness notes any changes to the transcript along with his reasons for the changes. Notice of any changes is served on all parties, and the transcript is then affirmed,[43] unless the parties have waived affirmation.

If the transcript is not affirmed, the witness, under penalty of perjury, must state his reason in writing. On motion to suppress,[44] the court may reject the unaffirmed deposition in whole or in part if it finds the reasons for refusal to affirm sufficient.

If a deposition is taken stenographically, the stenographer must certify that the witness was sworn and that the transcript is correct. When recorded by means other than stenography, the typist must certify on the transcript—under penalty of perjury—that he heard the witness sworn on the recording, and that the transcript is a correct writing of the recording.

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for transcribing the deposition. Normally, the party taking the deposition is responsible for the attendance fee, but the transcription fee is the responsibility of the party requesting the transcription. There may be more than one party making the request, in which event the fee could be divided in any way the parties desire.

[43] Miss. R. Civ. P. 30(e).

[44] *See id.* 32(d)(4) (motion to suppress must be made with reasonable promptness or waiver will result).

Copies of documents and things produced for inspection must, upon the request of any party during the deposition, be marked for identification and annexed to the deposition. Such documents and things may be inspected and copied by any party. The originals are retained by the person producing them and are marked for identification. He must afford each party the opportunity to compare any copy with the original. The original is retained for subsequent use in any proceeding. The court may on motion require that the original be annexed to the deposition and filed with the court pending final disposition of the case.

C. Failure to Appear and Expenses

If one noticing a deposition fails to attend, but others do attend, the court may order the party giving notice to pay the other parties' expenses, including reasonable attorney's fees. This rule also applies if a nonparty witness has not been subpoenaed and, because of such failure, does not attend.

Only the costs of serving subpoenas are generally taxed as court costs. While the rule does not expressly provide for the costs of process servers, presumably, these expenses would be proper costs also.

Depositions outside the state may be taken only after the noticing party has tendered the reasonable costs of transportation, food, and lodging. If necessary, the court may decide what are reasonable and necessary expenses. Of course, an out-of-state telephonic deposition would involve no expenses for food, transportation, or lodging; the only expense would be the cost of the conference call.

Note that rule 37 provides that motions for taxation of costs may be filed and considered by the court at the conclusion of a proceeding. Rule 29 permits an agreement that the reasonableness of expenses be determined by the court following the proceeding if the parties cannot otherwise agree and, thus, avoids the necessity of a pretrial hearing on such matters.

VI. Rule 31—Depositions Upon Written Questions

Rule 31 provides a special procedure for serving written questions upon any person, including a party.[45] This procedure will seldom be effective because of the options otherwise available under rule 30. For example, while the rule 31 deposition avoids the attendance of attorneys at out-of-state depositions, a telephonic deposition serves the same purpose and permits each party to listen to the answers to other questions before propounding his own. This is a more desirable procedure in most cases.

VII. Rule 32—Use of Depositions in Court Proceedings

Under certain conditions, all or part of a deposition may be offered into evidence. Of course, the deposition must be admissible under the rules of evidence. The deposition of a party may be used for any purpose by an adverse party. The deposition of any person, whether party or nonparty, may be used to contradict or impeach the testimony of the deponent as a witness. Additionally, the deposition of any witness may be used for any purpose if the witness is unavailable,[46] or if other exceptional

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[45] Written questions are served with notice to the other parties. Such notice must state either the name of the person who is to answer the questions or his classification, if the request is to an organization that has not yet designated a spokesman. The notice should also reflect the name, title, and address of the officer before whom the deposition is to be taken. Nonparty witnesses may be compelled to respond to written questions through a subpoena.

Thirty days after the receipt of the notice and written questions, the other parties may direct cross-questions to the deponent. Within 10 days thereafter, redirect questions shall be served. Within 10 days after redirect questions are served, re-cross questions are permissible. On motion, the court may change these time provisions.

A copy of the notice and of all questions are delivered to the official designated to take the deposition. After taking the testimony, the official prepares, certifies, and if requested, files the original. He mails copies to the parties, attaching thereto a copy of the notice and questions received by him.

[46] "Unavailable" includes:

(a) the witness is dead at the time of trial;
(b) the witness is more than 100 miles away or is out of state;
(c) the witness is unable to testify because of age, illness, or imprisonment; or
(d) the party offering the deposition has been unable to force the witness to testify.

Miss. R. Civ. P. 32(a)(3).

circumstances exist that, in the judgment of the court, make it desirable in the interests of justice to allow the deposition to be used.

Note, therefore, that there is no such thing as a "discovery deposition" as opposed to an "evidentiary deposition." A deposition is just a deposition, and any deposition may be used for any authorized purpose. If offered into evidence, the deposition is read, but it does not become an exhibit and does not go to the jury room. Exhibits to the deposition, if properly admitted into evidence,[47] do go to the jury just as any other exhibits do. If a particular portion of a deposition can be used to impeach a witness,[48] then that portion may be admitted into evidence in the same manner as any other prior written contradictory statement.

Objections to any portions of the deposition or its exhibits should be presented to the court as if the witness were present and testifying. If the action is dismissed or abated, if parties are substituted, or if another action is instituted between the same parties or their successors in interest, then depositions taken in the first action may be used in the latter.

While rule 32(c) expressly states that the deponent does not become the witness of a party merely by the party's taking his deposition, an apparent inconsistency arises when this provision is compared with rule 43(b)(4). Rule 32(c) provides, however, that if a party introduces a deposition into evidence for any purpose other than contradicting or impeaching the deponent, the deponent is that party's witness.[49] An exception to this rule arises when an adverse party uses a deposition pursuant to rule 32(a)(2).

Traditionally, in state court, when a witness becomes "your

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[47] Exhibits attached to the deposition prior to trial are attached only for identification and must be offered into evidence and ruled upon by the court. A suggested procedure is to request the court to rule just prior to trial on all objections to all depositions and on the admissibility of exhibits before the deposition is offered to be read. This procedure allows the deposition to be read without interruption and the exhibits to be received in an orderly and uninterrupted fashion.

A party may choose to offer only part of a deposition into evidence, in which event the adverse party may introduce any other parts that ought in fairness to be considered with the part introduced. Any party may introduce any other parts. *Id.*

[48] For example, the deposition may contain a prior inconsistent statement.

[49] MISS. R. CIV. P. 32(c).

witness," you normally cannot impeach him.[50] Rule 43(b)(4), however, provides that the credibility of any witness may be attacked by any party, including the party calling the witness, and rule 32(c) provides that any party may rebut any relevant evidence contained in the deposition. Consequently, it is difficult to see any significance remaining in the proposition that a deponent becomes "your witness" if the deposition is offered for evidentiary purposes. One possible effect of the rule is that making the deponent "your witness" may be used in other litigation as an adoptive admission of that testimony.[51]

Do not forget the Mississippi rule that the use of discovery can, in certain cases, waive the dead man's statute, which would otherwise prohibit incompetent evidence. The Mississippi rule is that taking a deposition or propounding interrogatories can operate to waive the rule, regardless of whether the deposition or interrogatory answers are later used in evidence.[52] There is authority, however, that requests for admissions are *not* such discovery as would operate to waive competency objections under the dead man's statute.[53]

All objections to notice of depositions are waived unless written objection is properly served upon the party giving notice.

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[50] *See, e.g.*, Alabama Power Co. v. Hall, 212 Ala. 638, 103 So. 867, 870 (1925) (at common law, a party was generally not allowed to impeach the credibility of his own witness); Clark v. Lansford, 191 So. 2d 123, 125 (Miss. 1966) (party cannot ordinarily impeach his own witness).

[51] *See* C. McCormick, *supra* note 8, § 269, at 650-51 (such a writing could reasonably be introduced at a subsequent lawsuit as an adoptive admission).

[52] *See* Drewry v. Hopper, 77 Miss. 744, 744, 27 So. 597, 597 (1900) (deposition waives rule); *accord* Goehring v. Dillard, 145 Ohio 41, 60 N.E.2d 704, 705 (1945) (deposition of decedent admitted). *See generally* Annot., 158 A.L.R. 306, 306-10 (1945) (deposition of deceased party); 81 Am. Jur. 2d *Witnesses* § 407 (1976) (same).

[53] *See* Booth v. Cureton, 81 So. 2d 662, 663 (Fla. 1955) (request for admissions does not waive competency objections). *But see* Burris v. Levy, 302 S.W.2d 171, 172-73 (Tex. Civ. App. 1957) (request for admissions waived statute).

Under the federal evidence rules, "Every person is competent to be a witness . . . . However, in civil actions . . ., with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Fed. R. Evid. 601. Thus, federal courts will not abrogate state dead man's statutes. *See* J. Weinstein, Evidence § 601-1 to -21 (1978) (effect of state dead man's statutes on Federal Rules of Evidence). *See generally* 81 Am. Jur. 2d, *Witnesses* § 407, at 415 nn.85 & 86 (1976) (waiver of incompetency by serving request for admissions).

Objections to the qualifications of the officer taking the deposition are waived unless made in writing as soon as the disqualification becomes known or could be discovered with reasonable diligence. All objections made at the time of the deposition are to be noted on the transcript or recording, and evidence that has been objected to is to be taken subject to the objection.[54] Objections to errors and irregularities occurring at the deposition are waived unless made during the deposition, since the errors might have been obviated, removed, or cured at that time. The most common example of this type of error is the leading question.[55] The party asking a leading question cannot rephrase it after the deposition is concluded. He must be given an opportunity to rephrase it at the time of the taking of the deposition; otherwise, the objection to the leading question is waived.

On the other hand, objections to the competency of a witness, or to the competency, relevancy, or materiality of testimony are not waived by failure to make these objections before or during the deposition. These objections are reserved and are included in the stipulation that the deposition is taken pursuant to the Rules. Any objections to the method of deposition or to the person taking the deposition are waived unless a seasonable objection is made. If one has a strenuous objection, a safer course of action would be to make a motion for a protective order before the deposition is to be taken.

Objections to the form of written questions served under rule 31 are waived unless made in writing within the time provided.[56] Objections to the manner in which the testimony is

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[54] It would appear that rule 30(c) is actually covered by rule 32(d)(3). The only evidence would be the testimony itself, which is covered by rule 32(d)(3). Any exhibits to the deposition are marked only for identification, subject to being ruled upon later by the court. Therefore, rule 30(c) regarding objections to "evidence" appears to be ambiguous and somewhat inconsistent with rule 32(d)(3).

Rule 32(d)(3) provides that objections to the competency of a witness, or to competency, relevancy, or materiality of testimony are not waivable due to failure to have them recorded.

[55] The rule includes errors in the manner of taking the deposition, in the form of question or answer, in the oath or affirmation, in the conduct of the parties, or errors of any kind which might be prevented, removed, or cured if promptly objected to. MISS. R. CIV. P. 32(d).

[56] Rule 31 provides 30 days in which to serve cross-questions, 10 days to serve redirect questions, and 10 days to serve re-cross questions. Accordingly, objections to ques-

transcribed, or to the preparation or transcription of the deposition, or to any matter otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made within a reasonable time after the defect is or should have been known.

VIII. Rule 33—Interrogatories

Interrogatories only involve parties to the action. The responding party must answer each interrogatory or object to it and give the reasons for the objection. Answers are signed by the responding party, and objections are signed by his attorney. The Rules specifically restrict interrogatories to thirty in number, and each interrogatory shall consist of a single question. The court may permit additional interrogatories on a showing of necessity.

Normally, interrogatories are answerable within thirty days of their service, but the defendant has forty-five days after service of summons in which to respond to interrogatories filed with the complaint. The court may shorten or lengthen this time on a proper showing. A party failing to respond to interrogatories is subject to rule 37 sanctions.

The scope of interrogatories is the same as that of discovery, and the answers may be used to any extent permitted by the rules of evidence. It is important to know that an interrogatory is not objectionable merely because its answer involves a conclusion of law.[57] On a proper motion, however, the court may order that such an interrogatory need not be answered until other designated discovery has been completed, or until such other time as the court deems proper.

If an answer to a question is to be derived from the business records of the party served, and the burden of ascertaining the answer is substantially the same for both parties, then it is sufficient to answer by reference to the records of the party and to give the examining party an opportunity to examine such records. The specification of records must include sufficient de-

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tions must be presented within 30 days after service of the questions. *Id.* 31(a).

[57] An example of this type of question is: "What are the factual and legal bases of your allegation that Jones was the agent of Smith at the time of the accident?"

tail to permit the interrogating party to readily identify the proper documents. The purpose is to prevent abuse by eliminating the previous practice allowing the responding party simply to make reference to business records without saying with specificity which records would provide the answer.[58]

IX. Rule 34—Production of Documents and Things and Entry upon Land

A party may serve on any other party to the action a request that he produce for examination and copying any designated document or electronic data compilation. In addition, he may request to inspect and copy tests or to sample any tangible things that might be discoverable. Further, a request may be made to permit entry upon land for the purpose of inspecting, photographing, and the like.

These requests may be made without leave of court. A request must set forth the items to be inspected and must describe each item and category with particularity. It should state a reasonable time, place, and manner of making the inspection and performing the acts.

The party upon whom the request is served must make a written response within thirty days, but a defendant need not respond until forty-five days after service of summons and complaint upon him. The response must state whether the request will be honored. If the response is objected to, the reasons for the objection must be stated; if the requesting party believes that the refusal is improper, he may move for a rule 37 order compelling inspection.

The producing party must produce documents as they are kept in the usual course of business and must organize and label them to correspond with the categories called for by the request. This requirement should deter attempts by a producing party to burden discovery with disarray or with deliberate mixing of critical documents in an effort to obscure their significance.[59]

Rule 34 does not preclude an independent action against a

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[58] *See* ABA Report, *supra* note 6, at 17-21.

[59] *See* Miss. R. Civ. P. 34 comment (new language intended to deter evasive responses).

nonparty for production of documents and for permission to enter upon land. Obviously, due process requires that a subpoena be served on such a person; it also requires a hearing to secure permission to enter and to inspect the land of a nonparty.[60]

X. Rule 35—Physical and Mental Examinations

Rule 35, which provides for compelled physical and mental examinations under the federal rules, has been omitted from the Mississippi rules.

XI. Rule 36—Requests for Admissions

Requests for admissions pertain only to parties to the lawsuit. Either party may serve upon the other a written request that he make certain admissions, which will be used only in the pending action. Both conclusions of law and issues of fact are subject to requests for admissions. The information sought must be within the scope of discovery, but may include a request to admit the truth of a matter relating to statements of facts, or the validity of an opinion, or the accuracy of an application of fact to law. In addition, the request may concern the authenticity of a document.[61]

It is insufficient for the responding party simply to state that he has no knowledge concerning the requested information; he must make reasonable inquiry to determine the answer to the request. This is a good faith area, and denials should meet the substance of the request fairly. If an answer should be qualified, it should be admitted in part and denied in part; the reasons for the denial should be stated with particularity.

If a party believes that responses to requests are insufficient, the matter may be brought before the court. If the court finds that the answer does not comply in good faith with the requirements of the rule, it may order either that the matter be admitted or that an amended answer be served. Both parties are

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[60] *See* 8 C. Wright & A. Miller, *supra* note 6, § 2209 (discovery from nonparties).

[61] Copies of such documents must be furnished with the request, unless they have been furnished previously.

subject to sanctions under rule 37.

Any matter that is admitted is conclusively established unless the court permits withdrawal or amendment of the admission. Admissions made under rule 36 are admissions for the purpose of the pending action only. They are not admissions for any other purpose, and they may not be used against the responding party in any other proceeding.

XII. Rule 37—Sanctions for Failure to Cooperate in Discovery

A party may move for an order compelling discovery in the court in which the action is pending. Even if the court denies the motion in whole or in part, it may make such protective order as otherwise would have been permitted. In addition, the court may award expenses and attorney's fees.[62]

If a party fails to appear for his deposition, or fails to serve answers or objections to interrogatories, or fails to serve written response to requests for admission, the court may make such orders with regard to these failures as are just. If a deponent fails to be sworn or to answer a question after being directed to do so, the failure may be considered a contempt of court. If a party fails to obey a protective order or an order compelling discovery, the court in which the action is pending may direct that the matters to be discovered be taken to have been established in accordance with the claim of the party obtaining the order. In addition, the court may refuse to allow the disobedient party to oppose designated claims or defenses and may prohibit him from introducing certain matters into evidence. The court may issue an order striking pleadings or parts thereof or staying further proceedings until the order is obeyed. It may dismiss any part of the action and may even render a judgment by default against the disobedient party. Failure to act may not be excused

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[62] If the motion is granted, the court may order the party whose conduct necessitated the motion, or the attorney advising such conduct, or both, to pay the moving party the reasonable expenses incurred, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified. If the motion is granted in part and denied in part, the court may apportion the expenses between the parties in a just manner.

on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order. The court may treat the disobeying of any order as contempt of court, and may make such other orders as it deems necessary.

Additionally, the court may require either the disobedient party, the attorney advising him, or both of them to pay the reasonable expenses, including attorney's fees, caused by the failure. This action is not, however, mandatory, and the court need not make such an order if the failure was substantially justified, or if other circumstances make an award of expenses unjust.

In addition to the application of these sanctions and the sanctions of rule 26(d), the court may impose upon any party or his counsel such other sanctions as may be just. These sanctions include the payment of reasonable expenses and attorney's fees if any party or counsel fails, without good cause, to cooperate in the framing of an appropriate discovery plan under rule 26(c) or if he otherwise abuses the discovery process in seeking, making, or resisting discovery.

A final provision, rule 37(e), is unique to the Mississippi rules and is adapted from the recommendations of the ABA Special Committee.[63] It is designed to give the court considerable latitude in imposing sanctions suitable for particular rule violations, and even permits assessment after trial of expenses and fees for failure to abide by rule requirements.

Conclusion

These Rules are designed to be self-executing, free from court intervention, and capable of accomodation to the convenience of communicating parties and attorneys.

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[63] *See* ABA Report, *supra* note 6, at 23-25.

TIME, EVIDENCE, SUBPOENAS, AND MASTERS, REFEREES, AND COMMISSIONERS—RULES 6, 43, 45, AND 53

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I. Rule 6—Time

Rule 6 is the basic provision in the Mississippi Rules of Civil Procedure governing computation of time. It is not, however, the primary source prescribing periods of time for performing acts pursuant to the Rules. Allowable time periods for performing acts are also stated within individual rules that permit, require, or define procedural acts.

In considering the provision of rule 6, the first determination to be made is whether the rule applies to the particular proceeding in question. Rule 1 states that the Rules shall govern procedure in the "circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity." Accordingly, the provisions of rule 6 are not applicable, for example, to appeals to the Mississippi Supreme Court, to proceedings in a special court of eminent domain, or to proceedings before administrative boards, commissions, and agencies.

Three basic principles for computing periods of time are

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given in rule 6(a): the first day of a period of time is not counted; the last day of a period of time is counted unless it is a Saturday, Sunday, legal holiday, or day that the courthouse or the clerk's office is in fact closed; and, if a period of time is less than seven days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation.

It must be remembered that rule 6 pertains only to procedural acts under the Rules. Thus, the exclusion of Saturdays, Sundays, legal holidays, or days that the courthouse or clerk's office is in fact closed should not be relied upon by the practitioner to extend the expiration date of a statute of limitations. In the event that the applicable statute of limitations expires on a Saturday, Sunday, legal holiday, or any other day that the courthouse or clerk's office is in fact closed, the prudent attorney should file his pleading either on the day before the Saturday, etc., or, if all else fails, directly with the judge or clerk of the court, irrespective of where they may be found. Such filing with the judge or the clerk is expressly permitted, although not encouraged, by rule 5(e).

The Rules contemplate only two instances in which action is permitted or required to be taken in less than seven days. Rule 6(d) requires that written motions be served not later than five days before the hearing thereon. Rule 65(b) allows an adverse party against whom a temporary restraining order without notice has been served to appear and move for dissolution or modification of the TRO after the giving of two days notice, or shorter notice as the court may prescribe, to the party who obtained the order.

In practice, application of the computation standards provided for in rule 6(a) necessarily results in a minimum of seven days for the doing of an action required to be done in five days. A subsequent draft of the Mississippi Rules of Civil Procedure removed intermediate Saturdays from the days to be excluded if a period of time is less than seven days; however, the draft of the Rules implemented by the supreme court in 1981 did not incorporate this amendment. It may be expected that at some point rule 6(a) will be amended to eliminate the provision that expands a five day period into a seven day period.

The legal holidays listed in rule 6(a) constitute all the legal

holidays presently provided for by statute in Mississippi.[1] Furthermore, it is not uncommon for courthouses or clerks' offices to close on several of the federal holidays that are not otherwise recognized in Mississippi. For example, Mississippi statutorily recognizes the eleventh day of November as Armistice or Veterans' Day. The corresponding federal holiday is usually observed on the Monday nearest such date. One could argue whether the courthouses are closed with or without legal authority on such dates, but the fact remains that when the doors are locked and the lights are off the courthouse is in fact closed. Unless one is attempting to meet a statute of limitations deadline on such a date, rule 6(a) provides a safety valve for accomplishing procedural actions without exceeding the allowable time period.

Rule 6(b) is a reasonably straightforward provision governing enlargements of time periods provided in the Rules. Generally, an enlargement of a time period may be granted ex parte if requested prior to the expiration of the original time period; however, an application for an enlargement after the original time period has expired requires a showing of "excusable neglect."[2] As with most other provisions in the Rules, the trial judge is accorded wide latitude in granting or denying requests for enlargements of time. Upon enactment of the Federal Rules of Civil Procedure, federal judges were often lenient with counsel who had failed to observe strictly the new time requirements.[3] Perhaps Mississippi judges will be equally tolerant while practitioners become familiar with our new Rules.

Significantly, rule 6(b) enumerates six proceedings in which enlargements of time will not be allowed: motions for judgment notwithstanding the verdict;[4] amendments to findings of fact by the court;[5] motions for new trials;[6] sua sponte orders by the trial

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[1] *See* MISS. CODE ANN. § 3-3-7 (1972) (listing state legal holidays). It is important to note that should any of the legal holidays fall on a Sunday, the following day is deemed to be the legal holiday. *Id.*; MISS. R. CIV. P. 6(a).

[2] For examples of "excusable neglect," see 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1165, at 622 n.72 (1971 & Supp. 1980).

[3] *Id.* § 1165 (1971).

[4] MISS. R. CIV. P. 50(b).

[5] *Id.* 52(b).

[6] *Id.* 59(b).

court for new trials;[7] motions to alter or amend judgments;[8] and motions for relief from a judgment or order.[9] The only enlargement allowable for these six proceedings is provided for in rule 6(e), which adds three days to the allowable time when service of a motion is made by mail.

Rule 6(c) is a brief, yet most significant, provision; it is perhaps as succinctly stated as any other provision in the Rules. Rule 6(c), importantly, does not abolish statutory court terms. The rule merely uncouples or unlinks from the commencement, the duration, or the expiration of a statutory court term the requirement for doing any act, other than the trial of a case itself, contemplated under the Rules. For example, prior Mississippi law required motions for new trials or for judgments notwithstanding the verdict to be made prior to the expiration of the term of court during which the case was being tried.[10] Thus, for cases adjudicated early during a term, anywhere from a week to almost a month was available to prepare and to file a motion for new trial or for judgment notwithstanding the verdict. Conversely, for a case adjudicated on the last day of a term of court, critically little time remained to prepare to seek relief from an adverse judgment. Rule 6(c) avoids this harsh result. Now, for example, under rule 59(b), a motion for a new trial must be made within ten days of the date the order is entered. Rule 58 provides the starting point for the running of the ten day period by stating that the judgment is deemed to be entered from the "time of delivery to the clerk for filing."

As has been stated, rule 6(c) does not abolish terms of court. To the extent that certain statutory proceedings are required to be performed only during a term of court, such requirements will prevail. Hence, divorces will continue to be triable only during a term of chancery court, unless during a term they are set for trial in vacation.

Clearly, terms of court will continue to be the elemental time periods during which courts—particularly circuit

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[7] *Id.* 59(d).

[8] *Id.* 59(e).

[9] *Id.* 60(b).

[10] *See* National Casualty Co. v. Calhoun, 219 Miss. 9, 15, 67 So. 2d 908, 909 (1953) (motion for new trial must be made prior to the expiration of the court term).

courts—will conduct the majority of their formal business. The Rules depart, however, from Mississippi's traditional view that court terms are the operational "windows" through which the courts' business passes. Rather, the Rules proceed upon the theory that most procedural matters, other than the trial itself, are conducted independent of court terms and, accordingly, should not be bound to the commencement, duration, or expiration of such terms.

There are five basic principles in rule 6(d) for the treatment of motions. First, five days notice to opposing parties is required before motions may be heard; this time is reduced to two days for proceedings to dissolve or modify a TRO under rule 65(b). Second, no notice is required for the hearing of ex parte motions. Third, the time for notice of motions may be altered either by the Rules or by court order; apparently, this period may be either expanded or reduced. Fourth, affidavits in support of motions must be served with the motion. Finally, with one exception,[11] opposing affidavits may be served not later than one day before a hearing.

Although Mississippi rule 6(d) is copied nearly verbatim from federal rule 6(d), it still tracks the motion practice with which Mississippi practitioners are already familiar. Motion practice consists of two steps: the preparation and delivery of the motion to the other parties and to the clerk of the court for filing, and the hearing on the motion. The motion must contain the style and number of the action, the court in which it is filed, and a caption identifying the document. Also, it must state the matter to be brought to the attention of the court and must be subscribed by the attorney of record by whom it is submitted. Additionally, the motion must contain a "notice" specifying when and where the motion will be heard and must include a certificate reciting that it has been served on all the other parties.

Most judicial districts in Mississippi have required counsel

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[11] The exception is for the provisions of rule 59(c). Miss. R. Civ. P. 6(d). Under rule 59(c), when a motion for new trial is based upon affidavits, the opposing party has 10 days from the service of the motion to serve opposing affidavits. This 10 day period "may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties' written stipulation." *Id.* 59(c).

to contact the trial judge in whose court and before whom the motion has been filed in order to reserve a time and date for the hearing on the motion; this reservation is commonly referred to as a fiat. With the advent of the liberalized motion practice contemplated by the new Rules, judges may decide to review their motion practice in search of a more efficient procedure. It is submitted that the only true need for judicial attention to motion practice occurs at the hearing of the motion itself.

A more efficient motion practice is provided for in rule 78. Rule 78 provides that, unless the local court orders otherwise, each court shall designate in advance regularly recurring monthly dates throughout its district when counsel can expect a judge to be available to hear motions. In preparing his motion, counsel would merely select a motion day sufficiently distant in time to permit at least five—in truth, at least seven—days service on all the other parties and would recite that date in the notice portion of the motion. The clerk of the court could maintain the motion day docket and, thereby, schedule in advance the court's motion day.

Rule 6(e) enlarges by three days the time allowable for taking action under the Rules when service of the notice for taking such action is made by mail. For example, under rule 12(a), a party must answer a cross-claim stated against him within thirty days of the service upon him. Rule 5(b) provides that service by mail is complete upon mailing. Thus, under rule 6(e), the party has thirty-three days from the date of mailing to answer the cross-claim. It should be noted that the three day enlargement is not applicable to the service of summons by mail under rule 4.

II. EVIDENCE—RULE 43

The initial factor to be considered in utilizing rule 43, as with all the other rules, is whether the instant proceeding is one that is subject to the Mississippi Rules of Civil Procedure, as detailed by rules 1 and 81.

Rule 43(a) is essentially a modified version of federal rule 43(a) as that rule appeared prior to the 1975 amendments enacted by the United States Supreme Court to conform the Federal Rules of Civil Procedure to the Federal Rules of Evidence.

Mississippi rule 43(b)(1), covering the control to be exer-

cised by the court at trial, is copied verbatim from rule 611(a) of the Federal Rules of Evidence. The comments to federal rule 611(a) provide the following:

> Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.
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> Item [i] restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, . . . the order of calling witnesses and presenting evidence, . . . the use of demonstrative evidence, . . . and the many other questions . . . which can be solved only by the judge's common sense and fairness in view of the particular circumstances.
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> Item [ii] is addressed to avoidance of needless consumption of time . . . .
>
> Item [iii] calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion.[12]

Rule 43(b)(2) conforms to the traditional Mississippi evidentiary rule permitting "wide-open" cross-examination, limited only by general considerations of relevancy and materiality.[13] The Mississippi "wide-open" cross-examination rule is substantially the same as the one that was favored by the United States Supreme Court in its February, 1973, Trial Draft of the proposed Federal Rules of Evidence.[14] The proposed provision was stricken by Congress in favor of the limited cross-examination

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[12] FED. R. EVID. 611 comment.

[13] *See, e.g.*, Rush v. State, 254 Miss. 641, 654, 182 So. 2d 214, 219 (1966) (wide latitude allowed in cross-examination); Holden v. State, 226 Miss. 726, 732, 85 So. 2d 208, 210 (1956) (cross-examination limited only to matters that cross-examining party could prove as part of his case).

[14] *Compare* MISS. R. CIV. P. 43(b)(2) (cross-examination limited only by general considerations of relevancy and materiality) *with* S. REP. No. 1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7071 (trial draft of federal rules permitting "cross-examination on any matter relevant to any issue in the case").

rule.[15]

Mississippi rule 43(b)(3) is a verbatim restatement of federal rule 611(c). This Mississippi rule adheres to the policy of proscribing leading questions when their suggestive powers would be undesirable. The rule makes exception, however, for the hostile, unwilling, or biased witness, the child witness, the adult witness with limited communicative abilities, the witness whose recollection is exhausted or momentarily blocked, and undisputed preliminary questions.[16]

Rule 43(b)(4), which deals with impeachment, departs from traditional Mississippi evidentiary law.[17] This rule allows the credibility of a witness to be attacked—that is, impeached—by any party, including the party calling him. This provision repeals the "voucher" rule that has been so severely criticized on constitutional grounds in criminal cases, particularly *Chambers v. Mississippi*.[18] As the comment to rule 43 states, the basis for the traditional voucher rule probably rests on a tenuous foundation: a party does not necessarily hold out his witnesses as worthy of belief since the party rarely has a free choice in selecting his witnesses; in addition, denial of the right to impeach unnecessarily leaves the party at the mercy of the witness, the adversary, and the circumstances of the case.[19]

Rule 43(c), entitled Record of Excluded Evidence, which is in accord with traditional Mississippi practice, allows an attorney to have evidence that has been excluded because of an objection placed into the record for consideration by the trial court and, ultimately, by an appellate court. The attorney may show specifically what he expects to prove by the excluded evidence, but the presentation of such proof must be made out of the presence of the jury. As a procedural suggestion, rule 43(c) pro-

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[15] *Id.* Under the Federal Rules of Evidence, cross-examination is limited to the subject matter of the direct examination and to matters affecting the credibility of the witness. FED. R. EVID. 611(b).

[16] MISS. R. CIV. P. 43 comment.

[17] Prior Mississippi law is reflected in the decision of Hooks v. State, 197 So. 2d 238, 240 (Miss. 1967), in which the court held that a showing of hostility or surprise is required for a party to impeach his own witness.

[18] 410 U.S. 284 (1973).

[19] MISS. R. CIV. P. 43 comment.

vides that the court may require the offer of proof to be made only after the close of the presentation of evidence by the side that initially called the witness. This procedural suggestion offers nothing new to Mississippi trial practice; it is a procedure that has been utilized through the years at the discretion of the trial judge to ensure an orderly presentation of evidence. By use of this procedure, the court can prevent any unnecessary disruption of the jury that might result as they are moved to and from the jury room when an attorney insists on making repeated offers of proof.[20]

Rule 43(d) is a simple provision requiring that all witnesses indicate their verity and sincerity in testifying either by the taking of an oath or, in deference to those whose convictions do not permit their swearing oaths, by the taking of a solemn affirmation that they will truthfully testify. Apparently, the taking of a solemn affirmation is the only alternative to the taking of an oath. If a witness refuses to take an oath or to solemnly affirm, the witness' testimony should not be received. The witness may thereafter be adjudicated to be in contempt of court, according to the circumstances of the case, but under no circumstances should the court permit the witness to insist upon any ritualistic or cult ceremony as a precedent to his testifying.[21]

Rule 43(e), another simple provision, allows the use of affidavits to present facts not appearing of record in support of motions. This practice is, however, subject to the discretion of the court, which may or may not permit the use of such affidavits. Rule 43(e) is a verbatim restatement of federal rule 43(e). This Mississippi rule is most useful when presenting motions to dismiss, to quash service of process, to challenge the jurisdiction of the court, for summary judgment, or for a new trial.[22]

Finally, rule 43(f) permits courts to appoint interpreters in those situations in which an interpreter may be necessary. The court should conduct a preliminary inquiry into the qualifications, skill, and knowledge of the interpreter to ensure that a

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[20] *Cf.* 9 C. WRIGHT & A. MILLER, *supra* note 2, § 2414 (discussion of federal rule 43(c)).

[21] *Cf. id.* § 2415 (discussion of federal rule 43(d)).

[22] *Cf. id.* § 2416 (discussion of federal rule 43(e)).

competent person has been selected to perform the interpretive services, and the interpreter should swear or affirm that his translations will be true.[23]

III. SUBPOENAS—RULE 45

Rule 45 differs from prior Mississippi subpoena practice in one major facet: the rule implements the "hip pocket" subpoena practice used for decades in federal practice. This practice allows blank subpoenas, issued by the clerk under the seal of the court, to be obtained by parties, to be filled in as the situation may demand, and to be served by the sheriff or any other person—including an attorney for a party—who is over the age of 18 and who is not a party.

Essentially, subpoenas are of two types: one is for the subpoena of witnesses (ad testificandum); and another is for the subpoena of documents and things (duces tecum). Under federal subpoena practice, a single form has been sufficient for both types of subpoenas; the "and bring with you" portion of the subpoena form is left blank or is marked out if only the attendance of the witness to testify is required.

A subpoena may be served anywhere within the state of Mississippi, but mileage expenses and appearance fees must be advanced to the subpoenaed witness who has to travel more than 100 miles to attend the hearing or trial.

Through rule 45, a party can compel the production of books, papers, documents, or other tangible things by the person in possession, custody, or control thereof. Production of the desired material may be had alone without the testimony of the person subpoenaed. To compel production of such items, it is not necessary that the person to whom the subpoena is directed have possession of or own the desired material. Rather, the test is whether the person to whom the subpoena is directed has control over the material.[24]

A problem frequently encountered in practice arises in suits involving businesses that maintain records outside of Missis-

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[23] *Cf. id.* § 2417 (discussion of federal rule 43(f)).

[24] *Cf. id.* § 2454, at 425 n.26 (discussion of federal rule 45).

sippi. There is no question that Mississippi courts are empowered to order the production of such out-of-state records, but an election must be made whether to have the records brought into Mississippi for discovery or to have discovery at the out-of-state location. As might be expected, the trial courts will usually order that the records be brought into Mississippi.

A party seeking production does not need to know exactly which documents he wishes to have produced; he may require production of all documents related to a specified issue or matter, but, where the cost of production is burdensome, the court may require the person seeking production to bear the expense.[25] One popular, practical procedure that has developed in federal court practice is in camera production. This procedure requires the person attempting to protect records he believes to be privileged to submit the records directly to the federal judge or magistrate, together with a request that the judge or magistrate privately review the records to determine whether all or any part need be produced. The protected parts are then masked or removed prior to delivery to the demanding party.

There is no requirement in rule 45 that one request a subpoena in writing. Since the subpoena is issued upon the request of a party without notice to the other party or without action by the court, it is necessary to provide some means of protection for the person to whom the subpoena is directed. Except for the provisions governing the places where depositions may be taken and the allowance of witness fees, rule 45 contains no provision for the protection of a person who has received a subpoena to testify. Sections (b) and (d) of rule 45 make available, however, remedies to persons upon whom a subpoena to produce documents has been served. Rule 45(b) provides that a person on whom a subpoena to produce documents has been served may move the court to quash or to modify the subpoena if it is unreasonable and oppressive. When such a motion has been made, the court may condition the denial of the motion upon the advance payment by the person on whose behalf the subpoena has been

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[25] *See* Mattie T. v. Johnston, 74 F.R.D. 498, 502 (N.D. Miss. 1976) (party requesting a subpoena that is "unreasonable and oppressive" may be required by the court to advance the reasonable cost of producing the material).

issued of the reasonable cost of producing the books, papers, documents, and tangible things that are sought. Where production of material is sought in connection with a deposition, rule 45(d) provides that the person to whom the subpoena is directed may serve upon the attorney designated in the subpoena written objections to inspection of the designated materials. After objection has been made, the party serving the subpoena may not inspect the material until an order of the court has been obtained. Also, after objection has been made, the party serving the subpoena may move the court, with notice to the deponent, for an order compelling production. Objection to the subpoena may only be made by the person from whom the documents are requested. Unless a party claims some personal right or privilege regarding the documents sought, he has no standing to seek to quash a subpoena directed to another. Of course, either a party or non-party may move for a protective order under rule 26(d).

Under rule 45(f) a person who fails to obey a subpoena may be held in contempt of the court from which the subpoena was issued unless the person has an adequate excuse for such failure.[26] In addition, rule 37 provides that the court may impose liberal sanctions against any person who fails to make or to cooperate in discovery.[27]

Complementing the court's traditional power of contempt for compelling compliance with and otherwise enforcing the subpoena powers, rule 45(g) grants the court broad sanctions to enable it to curb the unprofessional use of subpoenas. The rule provides for sanctions against a party who exercises the subpoena power in bad faith or in such a manner as unreasonably to annoy, to embarrass, or to oppress the party or person upon whom the subpoena is served. In such circumstances, the court

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[26] In Mattie T. v. Johnston, 74 F.R.D. 498 (N.D. Miss. 1976), the court held that advice of counsel is not an adequate excuse for disobeying a subpoena. *Id.* at 502. The court, however, declined to punish the individual disobeying the subpoena and required only that he produce the sought-after documents. *Id.*

[27] In Lindsey v. Jackson, 87 F.R.D. 405 (N.D. Miss. 1980), the court, utilizing FED. R. CIV. P. 37, entered a judgment against a defendant for his failure to comply with discovery requests. The court, quoting Emerick v. Fenick Indus., 539 F.2d 1379, 1381 (5th Cir. 1976), stated that defendant's actions demonstrated, "flagrant bad faith and callous disregard of . . . responsibilities." 87 F.R.D. at 407.

in which the action is pending may order that the subpoena be quashed and may enter such further orders as justice may require. The court may also award the attorney's fees and expenses involved in challenging the subpoena to the successful movant and may require that this amount be paid directly by the attorney who caused the issuance of the subpoena.

There are circumstances under which a subpoena for a witness must be issued by a court other than the court in which the litigation is pending. For example, if the litigation is pending in Lafayette County and a witness for deposition resides and works in Warren County, the subpoena is *not* issued by the court in Lafayette County. A copy of the Deposition Notice is filed in Lafayette County, and a certified copy is transmitted to the clerk in Warren County, who then issues the subpoena. This practice allows the Warren County judge to hear the motion to quash the subpoena. Thus, the Warren County witness is no longer required to travel to Oxford to be heard on the motion, and, when such a motion is made, the parties to the litigation must travel to Warren County if they choose to be heard on the motion. At first blush this might appear to be strange, but this procedure does provide the witness, who has not initiated the litigation and who usually has no stake in the outcome, with some rights and the ability to at least be heard without leaving his own county.

IV. Masters, Referees, and Commissioners—Rule 53

Reference of matters to a master is discretionary with the trial judge. Rule 53 makes clear that reference to a master should be the exception rather than the general rule and that reference should occur only in rare cases when required by some "exceptional condition." It is said that a master's duty is to aid, not to displace, the trial judge, and reference should be made to a master for a limited purpose only. Reference to a master is not widely used in modern federal court practice. Perhaps this is because under the Federal Magistrate Act of 1979,[28] magistrates

[28] 28 U.S.C. § 636(c) (Supp. III 1979).

are often used for this work.[29] There would seem to be little reason to expect any widespread use of reference to masters in our state courts.

It has been said that experiences with masters in federal courts "have not been happy ones." The caveat of Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court is worthy of quotation: "There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to reference with a busy lawyer as a referee."[30]

Reference generally follows a motion by one or more parties, but it is clear that the court may make the reference on its own motion.[31] Likewise, it is clear that the court need not order reference even if all the parties request it.

It is impossible to say with certainty what factors will constitute an "exceptional condition" sufficient to justify reference to a master. Traditionally, it was assumed that factors such as calender congestion, complexity of issues, and length of trial were sufficient. In *LaBuy v. Howes Leather Co.*,[32] however, the United States Supreme Court concluded that these factors did not constitute an "exceptional condition" warranting reference of an antitrust suit under rule 53 of the Federal Rules of Civil

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[29] It should be noted that the United States Supreme Court has held that reference to a master does not violate constitutional provisions. *See In re* Peterson, 253 U.S. 300, 311 (1920) (use of master in jury cases does not violate constitutional right to a jury trial).

[30] 9 C. WRIGHT & A. MILLER, *supra* note 2, § 2603 (quoting A. VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1240-41 (1952)).

[31] V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 601 (2d ed. 1950).

[32] 352 U.S. 249 (1957). Eighty-seven shoe repair shops sued six defendants, alleging a conspiracy in violation of numerous antitrust statutes. Over 50 depositions had been taken, and the case was consuming the district judge's entire time. After requesting that the parties agree to a reference, which both declined, the district judge made an independent reference to a master. *Id.* at 252-53. The Court of Appeals for the Seventh Circuit, on writ of mandamus, ordered the reference vacated. Howes Leather Co. v. LaBuy, 226 F.2d 703, 711 (7th Cir. 1955), *aff'd sub nom.*, LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

It should be remembered that an order of reference is interlocutory in nature and, accordingly, is not appealable. *See* 9 C. WRIGHT & A. MILLER, *supra* note 2, § 2615 (order of reference under FED. R. CIV. P. 53 is interlocutory and not appealable but may be vacated by issuance of writ of mandamus). The issue in *LaBuy* was reached by utilizing a writ of mandamus.

Procedure.[33] In *Mullinax v. Willett Lincoln-Mercury*,[34] the district court rejected the contention that *LaBuy* proscribed the categorization of an entire class of cases as suitable for reference to a master. The court stated that while certain classes of cases have characteristics that almost always render reference inappropriate, the characteristics of other categories of cases are such that reference would be justified in almost all instances.[35] Thus, while *LaBuy* seems to indicate a general policy against reference in most situations, it appears that both the characteristics of the type of action involved and the considerations involved in the particular case should determine whether a situation is sufficiently "exceptional" to warrant reference to a master.

Rule 53 requires that the appointment of a master be made in favor of a licensed Mississippi attorney unless the issues for consideration are of such a nature as to require special knowledge. The rule continues to allow individuals other than attorneys to conduct judicial sales and partitions. It is anticipated that bonds will continue to be required of special commissioners conducting the sale of property. There is no provision in the rule respecting the relationship of the master to any of the appointing judges, but a federal statute[36] provides that a federal court master may not be closer than a first cousin to any of the judges.[37]

Rule 53(a) provides that the master shall receive "reasonable compensation." There is no absolute requirement that the master's fee schedule be set by the court at the time of reference, but it is submitted that an enlightened master should never accept appointment without having a clear understanding with the court as to how his fee is to be computed and how it is

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[33] 352 U.S. at 259; *see also In re* Watkins, 271 F.2d 771, 775 (5th Cir. 1959) (one complicated issue within a suit does not justify reference).

[34] 381 F. Supp. 422 (N.D. Ga. 1974).

[35] *Id.* at 423. Upholding a local rule authorizing the use of masters in all truth-in-lending cases, the *Mullinax* court found that such cases almost always had characteristics that would justify the use of a master. In contrast, the court stated that antitrust cases, such as *LaBuy*, required such skill and expertise that reference to a master would almost always be inappropriate. *Id.*

[36] 28 U.S.C. § 458 (1976).

[37] *Id.*

to be paid. In *Newton v. Consolidated Gas Co.*,[38] the United States Supreme Court held that a master should receive "liberal but not exorbitant" compensation[39] and that the fixing of a master's fee is a matter of judicial discretion, subject, however, to review in cases of abuse.[40] Noting that the master's compensation for one year was fifteen times greater than the trial judge's own salary and eight times greater than the salary of a Supreme Court Justice, the *Newton* Court concluded that the trial judge had abused his discretion in setting the master's compensation.[41]

In practice, the trial judge will frequently order the party requesting the reference either to pay in advance the master's fees on a periodic basis or to post bond for the payment, but will preserve the question of final payment liability until the master's report has been received. These matters of method of payment should be provided for in the order of appointment. The master may not retain his report as security for payment of his fee, but he does have the right of a writ of execution against a party who has been ordered to pay him.

No special form of order of reference is required. The order of reference should contain, however, some specific provisions as to the master's duties and the scope of his inquiry.[42]

A master may be appointed at any time, even after the case has been remanded for a second trial, if the necessity exists. It is submitted that a good example of when the necessity for a master would arise is where the supreme court has made a finding of legal liability and has remanded the action to the trial court for the sole purpose of determining damages in a complicated accounting action. It should be remembered that the activities of the master remain subject at all times to the ultimate control of the appointing court. Ordinarily, the court will not interefere with its appointed master as he proceeds with his work,

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[38] 259 U.S. 101 (1922).

[39] *Id.* at 105.

[40] *Id.* at 104-05.

[41] *Id.* at 105-06.

[42] Connor v. Johnson, 330 F. Supp. 521, 524 (S.D. Miss. 1971), contains a well-worded order of reference, prepared by Circuit Judge J.P. Coleman. *See generally* 4 WEST'S FEDERAL FORMS § 4400 (1970) (form of order for reference in jury action).

but will await receipt of his final report and then will either accept, reject, or modify it, or, if necessary, resubmit it to the master for further consideration.

If the trial court makes a reference on its own and the attorney is displeased, the proper attack is to move the appointing court for a revocation of the order of reference; it is not proper to raise the propriety of the reference itself before the master to whom the action has been referred. Rule 53(g)(4) authorizes the master to submit a draft or initial copy of his report to counsel for their suggestions prior to the time the report is to be filed; the master is not required to submit a draft of the report, but he may do so if he so chooses.

The authority for the master to begin his work commences at the time he receives a certified copy of the order of reference. The master then must proceed with all reasonable diligence, setting a time and place for the first meeting of the parties, which is to be held within ten days of the date of the order of reference.[43] If the master procrastinates, any party may petition the court to have the master speed the proceedings.[44] If the master encounters problems, he may apply to the appointing court for additional instructions or for authority to employ additional personnel to assist him in performing his duties.

The powers of a master are set forth in rule 53(d). In federal practice, a master no longer has the power to issue subpoenas. Rather, in order to be effective, the subpoena must be obtained from the clerk of the court.[45] Under the Mississippi rule, it is clear that the master may issue subpoenas and other process to compel attendance.

When the master's inquiry is finally completed, he must make a written report to the court conforming to the order of reference. Generally, this report should include the following topics: Issues, Findings of Fact, Conclusions of Law, Conclusions, and Recommendations. The report, along with the transcript of proceedings and evidence, must be filed with the clerk,

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[43] *See* 4 WEST'S FEDERAL FORMS § 4422 (1970) (example of master's notice of first meeting).

[44] *See id.* § 4428 (example of notice of motion to speed the master's proceedings).

[45] *Cf.* 9 C. WRIGHT & A. MILLER, *supra* note 2, § 2610 (clerk is to issue subpoena under federal rule 45).

who shall then mail all parties notice of the fact that there has been a filing of the master's report. Thereafter, within ten days after being served, any party may file written objections to the master's report.

Rule 53(g) provides that the court must accept the master's findings of fact unless they are "manifestly wrong." The master's findings of fact are given a strong presumption of validity, but they are not given the effect of a jury verdict. A party satisfied with the master's report would do well to file a Motion for Confirmation of the report, and, though not required, it would behoove the attorney to have a statement in the record that he is satisfied with the report. Any application for confirmation or for hearing the written objections against the master's report should be made by written motion, and notice of the hearing should be given as required by rule 6(d). As noted earlier, the trial court may either adopt, modify, or reject the master's report, or may resubmit it to the master for further work.

The effect of the master's report is the same regardless of whether the parties consented to the reference in the first place. When the parties stipulate that the master's findings of fact shall be final, however, only questions of law shall thereafter be considered.

JURIES AND JURY VERDICTS—RULES 38, 48-51, and 59

*Niles McNeel**

The Mississippi Rules of Civil Procedure make relatively few changes from prior practice in the procedures that will be followed in jury trials. The changes that do occur and the similarities to pre-Rule practice are discussed below.

I. Rule 38—Jury Trial of Right

Rule 38 makes no change as to the right of trial by jury. A party is entitled to a jury under the Rules in the same circumstances in which he was entitled to a jury under pre-Rule law.

The right to a jury trial under article III, section 31, of the Mississippi Constitution has been interpreted not to "extend to questions in the trial of which a jury is not necessary by the ancient principles of common law."[1] Accordingly, a jury trial in chancery court is discretionary unless provided for by statute;[2]

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[1] Aldridge v. Bouge Phalia Drainage Dist., 106 Miss. 626, 628, 64 So. 377, 378 (1914) (citations omitted).

[2] Carradine v. Estate of Carradine, 58 Miss. 286, 293 (1880); *see* V. Griffith, Mississippi Chancery Practice § 597 (2d ed. 1950) (jury trial in equity case is not premised on a right but is within chancellor's discretion).

Without elaboration, the comment to rule 38 cites Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927). Presumably, this case is cited for the proposition that the absolute right to a trial by jury could be denied where a chancellor erroneously assumes jurisdiction, since the supreme court is prohibited by Miss. Const. art. VI, § 147, from overruling the denial, even on an interlocutory appeal. *See* 147 Miss. at 191, 113 So. at 434. Thus, a chancery court could hear and decide personal injury cases without a jury.

A recent decision of the Mississippi Supreme Court, Robertson v. Evans, 400 So. 2d 1214 (Miss. 1981), apparently limits *Talbot & Higgins*. *Robertson* involved a personal injury suit brought in chancery court by a minor. The defendant moved to dismiss for lack of jurisdiction, or, in the alternative, to transfer the cause to circuit court. The chancery court overruled the defendant's motion, and the defendant petitioned the supreme court for an interlocutory appeal. The supreme court denied the defendant's petition but

the same will be true under the Rules.

Subsection (b) of rule 38 removes any confusion that may exist concerning whether a jury trial has been waived by requiring "a specific, written stipulation that the right has been waived and requesting that the action be tried by the court." To complete the record, an order should be placed in the file of the case, reciting that the court, pursuant to the written stipulation and request, assented to try the case without a jury.

II. RULE 48—JURIES AND JURY VERDICTS

Subsection (a) of rule 48, providing for twelve-person juries and nine-person verdicts in circuit and chancery court, does not alter prior practice. Although there is no constitutional or statutory authority for twelve-person juries in such courts, the Mississippi Supreme Court has held, "A trial by jury in a court of superior original jurisdiction is universally held to mean a jury of twelve qualified persons."[3] The nine-person verdict recognized by this rule is provided for in the state constitution[4] and by statute.[5]

Subsection (b) changes prior practice by providing for six-person juries in county court and, further, by providing that five or more of these jurors may return a verdict. This rule supplants the statutory authority requiring twelve-person juries and nine-person verdicts in county courts.[6]

The procedure for selecting alternate jurors under rule 47(d) is identical to the procedure followed prior to the adoption of the Rules.[7]

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directed the chancery court to transfer the case to circuit court in order to ensure the defendant her absolute right to a trial by jury in a case historically tried by a jury. *Id.* at 1215.

[3] Dement v. Summer, 175 Miss. 290, 303-04, 165 So. 791, 793 (1936).

[4] MISS. CONST. art. III, § 31, permits the legislature, "by enactment, [to] provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury."

[5] MISS. CODE ANN. § 13-5-93 (1972) tracks the language of article III, § 31, of the state constitution. In Ulmer v. Pistole, 115 Miss. 485, 490, 76 So. 522, 524 (1917), the Mississippi Supreme Court rejected a challenge to the constitutionality of a nine-person verdict in a civil case.

[6] The statute supplanted is MISS. CODE ANN. § 13-5-93 (1972).

[7] MISS. R. CIV. P. 47(d) is adapted from MISS. CODE ANN. § 13-5-67 (1972), which

III. Rule 49—General Verdicts and Special Verdicts

As the comment to the rule points out, the purpose of rule 49 is to continue the commonly used general verdict practice in Mississippi *and* to reinstate the practice of special verdicts where the court allows it. Subsection (a) of the rule makes it clear that in the usual case the verdict will remain a general one. Where the case is complicated or where the issues can be clearly differentiated, the court may, however, in its discretion, require a special verdict in the form of a special written finding of an issue of fact.[8]

The availability of special verdicts modifies existing practice, since section 11-7-157 of the Mississippi Code provides "No special form of verdict is required." Prior to the new Rules, the law in Mississippi regarding special verdicts was clear: the supreme court, in 1946, declared, "In Mississippi, we have only general verdicts."[9] The exception to general verdicts has been that in cases where both actual and punitive damages were sought, trial judges were directed to instruct the jury to cause their verdict to reflect separate amounts for actual and punitive damages.[10] Where both punitive and actual damages are involved, these special types of verdicts should still be used.

While the rule indicates that the court will prepare the proposed questions for special verdicts, the comment points out that in practice attorneys will actually prepare these questions and the court will then pass on them in the same manner as

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sets forth the method for impaneling alternate jurors.

[8] The use of special verdicts in federal courts generally has been confined to complex cases. *See, e.g.*, Envirex, Inc. v. Ecological Recovery Assocs., Inc., 454 F. Supp. 1329, 1339-40 (M.D. Pa. 1978) (special verdict procedure localizes evidentiary problems in complicated cases and allows jury to direct its focus to specific factual issues), *aff'd mem.*, 601 F.2d 574 (3d Cir. 1979); *see also* Cote v. Estate of Butler, 518 F.2d 157, 160 (2d Cir. 1975) (special verdicts utilized to simplify issues and to prevent confusion in consolidated cases with numerous causes of action).

[9] Flournoy v. Brown, 200 Miss. 171, 181, 26 So. 2d 351, 355 (1946).

[10] *See* Capital Transp. Co. v. McDuff, 319 So. 2d 658, 662 (Miss. 1975) (suggesting that jury verdicts specifically reflect the amount of actual and punitive damages awarded); *see also* West Cash & Carry Bldg. Materials v. Palumbo, 371 So. 2d 873, 878 (Miss. 1979) (failure of trial court to instruct jury to have its verdict reflect separate awards for actual and punitive damages rendered supreme court unable to determine which damages the verdict reflected).

instructions. Attorneys who decide that special verdicts might be helpful in a case should note that subsection (b) provides that if an issue of fact is omitted and timely objection is not made, then submission of that fact to the jury is waived. In that event, the court itself will make a finding of fact on that issue, or, in the alternative, the finding of fact will be in accord with the special verdict judgment.[11]

The comment points out that this rule does not affect the way a jury may be polled *after* a verdict is rendered. The procedure of polling the jury is still limited to asking individual jurors, "Is this your verdict?"[12]

IV. RULE 50—MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The procedure for moving for a directed verdict under rule 50 follows prior practice *except* for subsection (a) of rule 50, which requires the movant to state the specific grounds for the motion. Heretofore, specificity had not been required.[13]

Subsection (b) initiates a major change in the time allowed for filing a motion for judgment notwithstanding the verdict. Under prior practice, such motions were required to be made before adjournment of court. This practice worked a hardship on attorneys who completed a case on the last day of the term.[14] Under rule 50, attorneys have ten days after judgment has been entered to make motions for judgment notwithstanding the verdict, even if the ten days extends past the adjournment of court. Entry of judgment is defined as the time of delivery to the clerk for filing.[15] Attorneys should be aware that this rule shortens the time for filing a motion for judgment notwithstanding the ver-

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[11] For a discussion of special verdict practice under FED. R. CIV. P. 49(a), which is identical to MISS. R. CIV. P. 49(b), see 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2505 (1971 & Supp. 1981).

[12] MISS. R. CIV. P. 49 comment; *see, e.g.*, Baker v. Sherwood Constr. Co., 409 F.2d 194, 195 (10th Cir. 1969) (jury polled in "traditional" manner: "Is this your verdict so say each of you?").

[13] *See* Covington County v. Morris, 122 Miss. 495, 501, 84 So. 462, 462 (1920) (defendant not required to specify reasons for requesting peremptory instructions).

[14] *See* National Casualty Co. v. Calhoun, 219 Miss. 9, 14-15, 67 So. 2d 908, 909 (1953) (trial judge lacked jurisdiction to continue case tried on last day of term).

[15] MISS. R. CIV. P. 58.

dict if a judgment is entered toward the *beginning* of the term. Note also that the rule appears to provide that a motion for judgment notwithstanding the verdict is available only to a party who has moved for a directed verdict at the close of the evidence in the case.[16]

Subsection (c) allows the trial court to make conditional rulings on a motion for judgment notwithstanding the verdict or for a new trial. Four options are available to the court when a motion in the alternative for judgment notwithstanding the verdict or for a new trial is made: (1) it may deny the motion for judgment and grant a new trial; (2) it may grant the motion for judgment and deny the motion for a new trial; (3) it may grant both motions; or (4) it may deny both motions.[17] If both motions are granted, the allowance of a new trial is conditioned on the reversal of the grant of the motion for judgment. The finality of the judgment is not affected by the conditional grant of the motion for a new trial, and an appeal can be perfected on the grant of the motion for judgment.

The rule enunciates and the official comment elaborates on the courses of action available to the appellate court when it considers conditional rulings pursuant to subsection (c). In the final analysis, the supreme court is not limited by this rule in determining whether judgment should be entered on the judgment notwithstanding the verdict or whether there should be a subsequent proceeding. The conditional ruling simply gives the appellate court an opportunity to consider what the trial court believes should be done if the trial court's first alternative is overruled.

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[16] MISS. R. CIV. P. 50(b) provides in pertinent part:

> Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

[17] The comment to rule 50 pertaining to these four options is identical to that found in 9 C. WRIGHT & A. MILLER, *supra* note 11, § 2540, at 616-21 (1971).

V. RULE 59—NEW TRIALS; AMENDMENT OF JUDGMENTS

The practice of granting a new trial under the new Rules is the same as under prior law—only the procedure has changed. Under rule 59, the motion for a new trial no longer must be filed before the adjournment of court but instead must be made within ten days after the entry of judgment.[18] Note that the time limit for making the motion for a new trial dates to the service of the motion on the parties, rather than to the filing of the motion with the clerk. The same time limit under rule 50 (e) applies to motions to alter or to amend a judgment.

When needed, affidavits supporting the motion for a new trial must be served with the motion. Opposing counsel has a maximum of thirty days (ten days, plus a possible twenty-day extension) to serve counter-affidavits.

It is important to note that the time for filing the motion for a new trial, the time the court can act of its own initiative to grant a new trial, and the time to alter or to amend the judgment (all being ten days after the entry of judgment) cannot be enlarged.[19]

VI. RULE 51—INSTRUCTIONS TO THE JURY

Rule 51(a) provides that the instructions to the jury on legal issues shall be in writing. Rule 51(a) is, however, a codification of existing case law providing that cautionary, procedural, and administrative oral instructions are permissible and are not violative of the requirement that instructions must be in writing.[20]

The remainder of rule 51 is substantially similar to pre-Rule law. Instructions will be designated *C* (Court), *P* (Plaintiff), or *D* (Defendant). The granting or denying of an instruction may not be assigned as error unless an objection is made before the jury is given the instructions and the grounds for the objection are specifically stated. Additionally, the instructions may be used by

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[18] *See* MISS. R. CIV. P. 58 (providing that judgments are entered for procedural purposes upon delivery to the clerk for filing).

[19] *Id.* 6(b).

[20] *See* Welch v. Morgan, 225 Miss. 154, 161-63, 82 So. 2d 820, 821-22 (1955) (statements made by trial judge regarding objections to testimony held not violative of requirement that instructions be written).

counsel during argument and may be taken with the jury to the jury room. The rule further provides that in multi-party actions, roman numerals shall be used to identify similarly aligned parties.[21]

The one real change made by rule 51 is that the instructions *must* now be presented at the pretrial conference if one is held under rule 16. If such a conference is not held, then the instructions must be "delivered to the court and counsel for all parties, not later than twenty-four hours prior" to trial.[22] Previously, there has been no requirement that the instructions be submitted earlier than twenty-four hours prior to trial. Rule 16 recognizes that in the event of a pretrial conference, supplemental or amended instructions may be presented subsequent thereto. Rule 51 reinforces the holding of *Newell v. State*[23] that the ultimate responsibility for the instructions rests with the court.[24] The attorneys may and should submit instructions, and the court may instruct on its own initiative.

The limitation of six substantive instructions in subsection (b) is one that can be changed if the court believes that a particular case requires it.

VII. Summary

The major changes in civil trial practice under the new Mississippi Rules of Civil Procedure as they pertain to juries and jury verdicts are:

(1) there will be six-person juries and five-person verdicts in county courts;
(2) while the usual case will still use a general verdict, special verdicts may be utilized;
(3) the time for filing motions for judgment notwithstanding the verdict and for a new trial is no longer limited by the adjournment of court but is ten days after entry of judgment; and

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[21] The comment to rule 51 explains that letters and numbers are used to provide uniformity in identifying instructions for the trial record. Their purpose is neither to reveal nor to disguise the identify of the party requesting instructions.

[22] The logical interpretation of "delivered to the court" is "filed with the clerk."

[23] 308 So. 2d 71 (Miss. 1975).

[24] *Id.* at 77-78.

(4) when a pretrial conference is held, jury instructions should be submitted at such conference.

JUDGMENTS—RULES 41, 54(b), 55, 57, 58, and 60

*Robert B. Sessums**

Introduction

This portion of the symposium will cover the following Mississippi Rules of Civil Procedure in the order indicated: rules 57, 55, 54(b), 41, 58, and 60. Because of the space available and the number of rules to be covered, it will be impossible to cover each rule in depth. In areas that require interpretation, cases that interpret the questionable area will be cited. An effort will also be made to express the similarities or dissimilarities between the Mississippi and the federal rules.

I. Rule 57—Declaratory Judgments

Rule 57 essentially adopts the Uniform Declaratory Judgments Act, which was approved in 1922 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The rule bears little resemblance to federal rule 57. The purpose of rule 57 is to create a procedure whereby legal rights and obligations can be determined before either party is entitled to a legal or equitable remedy. To take advantage of the new declaratory judgment procedure, the claimant seeking relief under the rule must demonstrate that any such judgment entered will terminate the uncertainty or controversy between the parties.

For example, suppose that *A* owes *B* a certain sum of money and that *B* holds a promissory note apparently bearing *A*'s signature. *A* tells *B* that he will not pay the note at maturity because *B* procured *A*'s signature on the note by fraud. *B* wishes to list the note as an asset on his financial statement, and, there-

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fore, needs to know whether *A*'s position is well taken. Rather than waiting until maturity to bring an action on the note, *B* may bring a declaratory judgment action to determine the validity of the note.

Rule 57 relief is available in a number of other circumstances. When a person is interested under a deed, will, written contract, or other writing constituting a contract and wishes to have determined any question of construction or validity arising under the instrument, he may bring an action for declaratory judgment. Some jurisdictions allow the interpretation of a verbal contract by declaratory judgment, while others do not.[1] A verbal contract will probably be subject to interpretation by declaratory judgment, under rule 57, in Mississippi.[2]

When a statute, municipal ordinance, contract, or franchise affects a person's legal relations, he may seek declaratory relief to determine any question of construction or validity. Declaratory relief may also be sought to determine one's rights or legal relations under an estate, guardianship, conservatorship, or trusteeship.

As a practical matter, rule 57 is utilized by filing a complaint, as provided for in rule 3(a), which alleges the relationship, right, or obligation that needs to be determined and requests declaratory relief alone or in the alternative. Declaratory relief may also be sought in a counterclaim. The right to a jury trial in a declaratory judgment proceeding is expressly reserved under rule 57.

II. RULE 55—DEFAULT

It is important to understand the distinction under rule 55

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[1] *See, e.g.*, Wollenberg v. Tonningsen, 8 Cal. App. 2d 722, 48 P.2d 738, 741 (1935) (declaratory judgment available when rights of parties are in question under either an oral or written trust); Temm v. Temm, 354 Mo. 814, 191 S.W.2d 629, 632-33 (1946) (same); *In re* Dahl's Estate, 196 Or. 249, 248 P.2d 700, 702 (1952) (declaratory judgment establishes oral partnership agreement). *But see* Sheldon v. Powell, 99 Fla. 782, 128 So. 258, 260 (1930) (declaratory decrees available as to written instruments only); Superior Dairy, Inc. v. Stark Co. Milk Producers Ass'n, 89 Ohio App. 26, 100 N.E.2d 695, 698-700 (1950) (no declaratory judgment concerning implied contract to deliver milk).

[2] *See* MISS. R. CIV. P. 57(b)(4) (court's power not limited where declaratory relief would terminate a controversy).

between a "default" and a "default judgment." A "default" is entered by the court clerk upon the failure of the opposing party to plead or otherwise defend the action filed. The default is entered upon affidavit without any notice to the opposing party, is interlocutory, and is not appealable. The court will then enter a "default judgment" upon written application, but notice must be given to any appearing party, and, if necessary, there must be a hearing to determine damages. The default judgment is final and appealable.

The procedure for obtaining a default under rule 55(a) is simple. If the party against whom affirmative relief is sought has failed to plead or otherwise defend, the plaintiff, counterclaimant, cross-claimant, or third-party plaintiff files an affidavit in the clerk's office indicating this failure. The clerk then enters a default after determining that the affidavit complies with the requirements of rule 55(a).

The phrase "otherwise defend" includes the filing of a motion under rule 12; this filing might not technically be considered a responsive pleading. The United States Court of Appeals for the Fifth Circuit had occasion to interpret the phrase "otherwise defend" under federal rule 55 in *McGrady v. D'Andrea Electric, Inc.*[3] In that case, the court held that an entry of default was appropriate where the defendant had failed to attend the pretrial conference.[4] The failure to "otherwise defend" might, therefore, include the failure to appear at a scheduled hearing.[5]

Once the default has been entered by the clerk, an applica-

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[3] 434 F.2d 1000 (5th Cir. 1970).

[4] *Id.* at 1001. The corporate defendant's president had filed an answer in the form of a letter denying the allegations of the complaint. A pretrial conference was later held, and no one appeared for the defendant. The court ordered a default entered. A timely motion to set aside the default was filed but was overruled by the trial court. A default judgment was then entered and an appeal was taken. The fifth circuit affirmed the lower court's refusal to set aside the default but did not decide whether the letter was an adequate answer. *Id.*

[5] The courts have considered several other aspects of this issue. *See, e.g.*, Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426, 427 (2d Cir. 1967) (corporation failed to appoint counsel); Swallow v. United States, 380 F.2d 710, 711-12 (10th Cir. 1967) (defendant and counsel failed to appear at trial); Bass v. Hoagland, 172 F.2d 205, 207-08 (5th Cir. 1949) (defendant's counsel withdrew without withdrawing answer).

tion for default judgment must be filed with the court. If the party against whom the default judgment is sought has appeared in the action, he or his representative must be served with written notice of the application at least three days prior to the date set for hearing the application. Even if a party has not filed a responsive pleading or otherwise defended an action, the party may still be considered to have "appeared in the action" in a variety of circumstances, thereby entitling him to written notice of the application for default judgment. For example, the party might have filed an appearance with the clerk under rule 79 but have filed no responsive pleading. Also, the party might have sent a letter denying the allegations of the complaint to the clerk's office for inclusion in the file.[6] There might have been written or oral settlement discussions between counsel for the respective parties.[7] Additionally, there might have been an agreement between counsel to permit a late filing of responsive pleadings.[8] Some jurisdictions have held that a letter from the defendant to the plaintiff's attorney constitutes an appearance.[9]

Failure to give the required three-day notice to a party who has appeared in the action will probably result in the subsequent judgment's being set aside as void. In any case, the judgment would certainly be voidable.[10]

Once the application for the default judgment has been filed and any necessary hearing has been conducted, the default judgment is entered by the court. If the claim sued on is for a sum certain or a sum that can be made certain by computation, the judgment will generally be entered in that amount without further hearing. If the sum is not certain or capable of computa-

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[6] *See supra* note 4.

[7] *See* H.F. Livermore Corp. v. Aktiengellschaft, 432 F.2d 689, 692 (D.C. Cir. 1970) (exchanges to settle dispute constitute an appearance).

[8] *See* Hutton v. Fisher, 359 F.2d 913, 915 (3d Cir. 1966) (plaintiff allowed defendant more time to file answer).

[9] *See, e.g.*, Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3, 5-6 (D.S.C. 1970) (defendant's letter, although legally insufficient, constituted answer to summons); Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491, 492-93 (S.D. Tex. 1961) (defendant's letter constituted appearance in action).

[10] *See, e.g.*, Magette v. Daily Post, 535 F.2d 856, 857 (3d Cir. 1976) (judgment void); Meeker v. Rizley, 324 F.2d 269, 271 (10th Cir. 1963) (same); Savoretti v. Rodriguez-Jiminez, 252 F.2d 290, 291 (5th Cir. 1958) (same).

tion, the court will consider whatever evidence it deems necessary to determine the damages to be awarded. Also, there are certain situations specified in rule 55(e) where liability, as opposed to damages, must be established by evidence. If the defendant is under a legal disability, the party seeking the default judgment must establish his claim by the presentation of evidence. A party to a suit for divorce or annulment must establish by presentation of evidence his or her right to that relief, except that a divorce on the ground of irreconcilable differences may be granted pro confesso as provided for by Mississippi statutes.

Rule 55(c) provides for the setting aside of a default, as opposed to a default judgment.[11] In order to have a default set aside, the defaulting party must file a motion seeking that relief and good cause must be established. The good cause requirement is probably broader and more liberal in the default situation than in the default judgment situation. Courts have found the good cause requirement for setting aside a default to have been met in several instances. Doubt or confusion as to the court's jurisdiction has been held to be good cause to set aside a default.[12] Failure to receive notice in a forfeiture proceeding where service of process was by publication and was not seen by the defendant has been held to be a sufficient showing of good cause.[13] Good cause has also been found where the complaint was misunderstood.[14] Additionally, a default has been set aside for good cause where, acting under the mistaken belief that the wrong party had been served, a party failed to file an answer.[15] If the motion to set aside the default is overruled and a default judgment entered, the matter is ripe for an immediate appeal.

III. Rule 54(b)—Judgment upon Multiple Claims or Involving Multiple Parties

Mississippi rule 54(b) is identical to federal rule 54(b). This

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[11] Miss. R. Civ. P. 60(b) provides for the setting aside of a default judgment).

[12] *See* Phillips v. Flynn, 61 F.R.D. 574, 577 (E.D. Pa. 1974) (no strict compliance with substituted service statute).

[13] United States v. $3,976.62 in Currency, 37 F.R.D. 564, 566 (S.D.N.Y. 1965).

[14] *See* Rooks v. American Brass Co., 263 F.2d 166, 168 (6th Cir. 1959) (party handling seriously ill defendant's affairs erroneously interprets complaint).

[15] Dalminter, Inc. v. Jessie Edwards, Inc., 27 F.R.D. 491, 492 (S.D. Tex. 1961).

rule is designed to avoid the injustice of delaying the disposition of distinctly separate claims or of claims involving fewer than all the parties until the entire pending case is decided. It makes available an immediate appeal in those instances where it is applicable.

Rule 54(b) authorizes the court to direct the entry of final judgment as to fewer than all of the claims or parties in an action upon the following conditions: (1) the court is presented with more than one claim for relief, whether as a claim, counterclaim, cross-claim, or third-party claim, *or* when multiple parties are involved; (2) the court expressly determines that there is no just reason for delay in entering a final judgment as to that claim or party; (3) all the rights or liabilities of one or more of the parties regarding that claim have been adjudicated; and (4) the court expressly directs the entry of the judgment.

Sears, Roebuck & Co. v. Mackey[16] is illustrative of federal cases in which the courts have utilized federal rule 54(b) to dispose of multiple claims for relief. Determining that there was no just reason for delay in making a decision on some of the counts, the district court directed that a judgment be entered for the defendants on two of the four counts.[17] Mackey appealed the judgment on the two counts, and Sears filed a motion to dismiss for lack of appellate jurisdiction, claiming the judgment did not have the requisite finality to make it appealable.[18] The Seventh Circuit Court of Appeals upheld its jurisdiction and denied the motion for dismissal, relying on rule 54(b).[19] The Supreme Court of the United States recognized that rule 54(b) provided a practical means of permitting an appeal to be taken from one or more final decisions on individual claims in a multiple claim action without waiting for a final decision to be rendered on all

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[16] 351 U.S. 427 (1956). Mackey sued Sears, alleging several different counts including the following: (1) violation of the Sherman Antitrust Act; (2) destruction of the market for lamps manufactured by one of Mackey's wholly-owned corporations; (3) unlawful inducement of breach of contract; and (4) unfair competition and patent infringement. *Id.* at 430-31.

[17] *Id.* at 428.

[18] *Id.* at 436.

[19] *Id.* at 428.

claims in the case.[20] Therefore, the Supreme Court sustained the appellate jurisdiction of the judgment rendered on the two counts.[21]

The cases dealing with multiple claims are far more complex than those dealing with multiple parties. The following example of a multiple party case reflects the operation of rule 54(b). A plaintiff is injured by an intoxicated, uninsured motorist. Prior to the wreck, the defendant had been drinking at a bar in a state with no dram shop act. Knowing that any judgment against only the uninsured motorist would be uncollectible, the plaintiff sues both the driver and the owner of the bar. The court dismisses the action against the bar owner because there is not a dram shop act in effect in the particular state. The court then determines that there is no just reason for delaying entry of the judgment dismissing the action as to the bar owner and directs entry of judgment. Even though the case would still be pending against the uninsured motorist, the plaintiff may wish to test the decision as to the bar owner on appeal, and, under rule 54(b), he would have every right to do so.

IV. Rule 41—Dismissal of Actions

Rule 41 is designed to establish a uniform rule for voluntary and involuntary dismissals of actions filed in Mississippi state courts. The rule applies to the dismissals of complaints, counterclaims, cross-claims, and third-party complaints.

Voluntary dismissals, which are dismissals desired by the party bringing the claim prior to its adjudication on the merits, are divided into two groups—those allowed to be taken without a court order and those allowed to be taken only by order of the court. Rule 41(a)(1) provides that a claimant can dismiss an action without leave of the court by filing a notice of dismissal before the adverse party has served an answer or filed a motion for summary judgment. It should be noted that the rule provides that the notice must be filed before the answer or motion for

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[20] *Id.* at 435.

[21] *Id.* at 438. For a further discussion of the use of rule 54(b) in multiple claims suits, see Young, *Supreme Court Report: Federal Courts . . . Multiple Claims,* 66 A.B.A. J. 772, 776-77 (1980).

summary judgment has been "served." It may be that filing the notice of dismissal before the answer or motion for summary judgment has been served but after such answer or motion has been filed would be effective to dismiss the action.[22] If the opposing party has served an answer or a motion for summary judgment, a voluntary dismissal without a court order can be obtained by filing a stipulation of dismissal signed by all appearing parties.

If the adverse party has served an answer or a motion for summary judgment or if all appearing parties will not agree to a stipulation of dismissal, then a voluntary dismissal can be taken only by order of the court pursuant to rule 41(a)(2). Any dismissal taken by order of the court is subject to such terms and conditions as the court may impose. If a counterclaim has been filed, that counterclaim would remain pending even though the initial claimant has been allowed to voluntarily dismiss his action. Voluntary dismissals, whether with or without court order, are without prejudice unless otherwise specified in the court order.

Involuntary dismissals are governed by rule 41(b). In most instances such a motion would be made by the defendant. The rule specifically provides for such a dismissal in two instances. The first would be upon motion of the defendant for failure of the plaintiff to prosecute or for failure to comply with court rules or orders. An example of this type of situation would be where the plaintiff has failed to comply with an order to compel some form of discovery. Dismissal would, of course, be a drastic measure and would probably be utilized only in flagrant situations. The second instance in which the rule provides for an involuntary dismissal is upon motion of the defendant in a nonjury case where the plaintiff has failed to prove any right to relief after the presentation of his evidence. In such a situation, the court may either render judgment on the merits against the plaintiff, after making the findings of fact and conclusions of law required by rule 52(a), or the court may decline to render judgment until completion of all the evidence in the case. Unless the

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[22] *See* American Cyanamid Co. v. McGhee, 317 F.2d 295, 297 (5th Cir. 1963) (the court intimated this position regarding voluntary dismissals).

court otherwise specifies in its order, an involuntary dismissal under rule 41(b) operates as an adjudication on the merits, i.e., with prejudice.

There is a provision in rule 41(d) for a dismissal on motion of the clerk. Such a dismissal is authorized in all civil actions where there has been no action of record during the preceding twelve months. The clerk is required to mail notice to the attorneys of record that the case will be dismissed for want of prosecution unless action is taken within thirty days after the mailing of the notice, or unless an application in writing is made to the court and good cause shown why the case should be continued. The mailing of such notice is required in every eligible case not later than thirty days before June 15 and December 15 of each year.

Finally, rule 41(e) provides that the court may make an order for the payment of costs of a previously dismissed action if the plaintiff commences a subsequent proceeding dealing with the same claim against the same defendant and may stay the subsequent proceeding until the plaintiff has complied with the order.

V. Rule 58—Entry of Judgment

Rule 58, which bears little resemblance to federal rule 58, simply provides that, unless the court otherwise directs and subject to the provisions of rule 54(b) dealing with multiple claims and multiple parties, all judgments are deemed entered for procedural purposes from the time of delivery to the clerk of the court for filing.

VI. Rule 60—Relief from Judgment or Order

There are subtle variations in language between Mississippi rule 60 and federal rule 60. It would be well worth the practitioner's time to make a detailed comparison of the rules to identify these differences.

Rule 60(a) provides for the correction of clerical mistakes and oversight or omission errors in judgments, orders, and other parts of the record. Such corrections may be made either on motion by one or both of the parties or by the court on its own

initiative until the record is transmitted to the appellate court. Thereafter, corrections may be made only with leave of the appellate court.

Rule 60(b) sets forth the grounds upon which a court may relieve a party from a final judgment, order, or proceeding. These grounds are: (1) fraud, misrepresentation, or other misconduct of the adverse party; (2) accident or mistake; (3) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under rule 59(b); (4) void judgment; (5) judgment has been satisfied, released, or discharged; and (6) any other reason justifying relief from the judgment. Some of these grounds deserve further exploration.

The unauthorized dismissal of plaintiff's case by his attorney who mistakenly believed he had such authority has been found to be an accident or mistake sufficient to justify relief from a final judgment,[23] as has a defendant's erroneous belief that he was being represented by a co-defendant's attorney.[24]

Circumstances that render a judgment void so as to authorize relief under rule 60(b) include: (1) lack of either subject matter or in personam jurisdiction;[25] (2) unconstitutional action taken by the court;[26] and (3) action that was outside the court's statutory authority.[27]

"Other reasons" that justify relief under the catch-all provision of rule 60(b)(6) include: (1) trial being set while plaintiff

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[23] *See* McGinn v. United States, 2 F.R.D. 562, 563, 566 (D. Mass. 1942) (motion to vacate judgment allowed where counsel assented to dismissal without consent of plaintiff).

[24] *See* Standard Grate Bar Co. v. Defense Plant Corp., 3 F.R.D. 371, 372 (M.D. Pa. 1944) (judgment vacated where record showed that defendant learned for the first time that he was not represented by counsel after the judgment was taken); *see also* Griffin v. Kennedy, 344 F.2d 198, 200-01 (D.C. Cir. 1965) (judgment vacated on ground of mistake where attorney erroneously advised client to enter stipulation for purposes of summary judgment only); Weller v. Socony-Vacuum Oil Co., 2 F.R.D. 158, 159 (S.D.N.Y. 1941) (order dismissing complaint reversed because of court clerk's mistake in failing to serve relevant document).

[25] *See* Pennoyer v. Neff, 95 U.S. 714, 715-16 (1877) (in personam jurisdiction necessary for valid judgment).

[26] *See* Crosby v. Bradstreet Co., 312 F.2d 483, 483 (2d Cir. 1963) (rule 60(b) invoked to vacate a 1933 order found to be unconstitutional as a prior restraint on publication).

[27] *See In re* Borek, 180 F. Supp. 567, 571-72 (D.N.J. 1960) (referee in bankruptcy had no authority to enter judgments in favor of creditors filing claims found to be nondischargeable).

was out of town;[28] (2) complaint dismissed for failure of attorney to appear at pretrial conferences;[29] (3) gross neglect of plaintiff's former counsel;[30] and (4) plaintiff's inability to hire an attorney.[31]

In order to obtain relief from a final judgment, order, or other proceeding under rule 60 on the grounds of fraud, misrepresentation, other misconduct, accident, mistake, or newly discovered evidence, the motion seeking that relief must be made no more than six months after the judgment, order, or proceeding was entered or taken. If relief is sought on grounds other than those just specified, the motion must be made within a reasonable time. What constitutes a reasonable time usually depends on the facts and circumstances of each case. A number of decisions have provided some insight into this problem.[32]

To obtain relief under rule 60(b) once the record has been transmitted from the trial court to the appellate court, leave must be obtained from the appellate court to make the motion seeking the relief. It is also important to note that the making of a motion for relief under rule 60(b) does not operate as a stay or supersedeas of the judgment, order, or other proceeding from which relief is sought.

In addition to providing a procedure by which a party may

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[28] *See* Peterson v. Time Taxi, Inc., 429 F.2d 888, 889 (2d Cir. 1970) (judgment against plaintiff reversed where plaintiff's attorney received notice of a Monday morning trial setting on the previous Friday afternoon and plaintiff had left town for the weekend).

[29] *See* Welden v. Graceline, Inc., 404 F.2d 76, 77 (2d Cir. 1968) (judgment against plaintiff reversed where plaintiff's attorney's failure to appear at two pretrial conferences was due to good faith misunderstanding as to dates and times for such conferences).

[30] *See* King v. Mordowanec, 46 F.R.D. 474, 484 (D.R.I. 1969) (plaintiff's motion to vacate dismissal of complaint granted where gross neglect of former counsel shown).

[31] *See* Daly v. Stratton, 304 F.2d 666, 668 (7th Cir. 1962) (judgment of dismissal vacated where plaintiff could not obtain legal counsel because of financial difficulties).

[32] *See, e.g.*, Cavalliotis v. Saloman, 357 F.2d 157, 158 (2d Cir. 1966) (district court had discretion to dismiss order after 18 months where plaintiff did not receive notice until shortly before his motion to vacate was filed); Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538, 539 (2d Cir. 1963) (same; 15 months); L.M. Leathers' Sons v. Goldman, 252 F.2d 188, 189 (6th Cir. 1958) (consent judgment regarding patent set aside when patent subsequently found to be invalid); United States v. Edell, 15 F.R.D. 382, 383-85 (S.D.N.Y. 1954) (judgment compelling defendant to deposit monies from sales of property in escrow pending outcome of tax litigation set aside when deposit became substantially in excess of defendant's ultimate liability).

seek relief from a judgment, order, or other proceeding in the then pending matter, rule 60(b) goes on to state that such relief may also be sought through an independent action. Resort to such an action would be necessary in a situation where, for example, a judgment had been obtained by fraud, but that fraud had not been discovered in sufficient time to make a motion for relief within the six months allowed after the judgment.

CONCLUSION

The rules covered here deserve a much more detailed and exhaustive study. Care should be exercised by the practitioner in not assuming that these rules necessarily correlate with the federal rules bearing the same numbers. There are differences, some extreme and some subtle.

PROVISIONAL AND FINAL REMEDIES and SPECIAL PROCEEDINGS—RULES 64-71

*Guthrie T. Abbott**

The following portion of the symposium will deal with Chapter VIII, which includes rules 64-71. These rules focus upon the modes of enforcing judgments and orders of the court before, during, and after trial.

I. Rule 64—Seizure of Person or Property

Rule 64 provides that the procedures for seizing persons or property in advance of a final judgment "are available under the circumstances and in the manner provided by law" and that "[t]hese remedies include attachment, garnishment, replevin, claim and delivery, sequestration and other corresponding or equivalent remedies."[1] The rule leaves intact all such remedies as they existed prior to adoption of the Mississippi Rules of Civil Procedure. Nevertheless, the existing procedures deserve a brief comment since several of the actions named in rule 64 have apparent constitutional infirmities.

The constitutional problems stem from the line of United States Supreme Court cases starting with *Sniadach v. Family Finance Corp.*[2] in 1969. This line of cases struck down state prejudgment remedies that did not afford the debtor due process

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[1] Miss. R. Civ. P. 64.

[2] 395 U.S. 337 (1969); *see, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (holding Delaware's sequestration statute unconstitutional); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607-08 (1975) (holding Georgia's garnishment statute unconstitutional); Mitchell v. W.T. Grant Co., 416 U.S. 600, 604-05 (1974) (Louisiana sequestration statute upheld); Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (Florida and Pennsylvania prejudgment replevin provisions held unconstitutional). For a brief outline and discussion of the cases cited in this footnote, see 50 Miss. L.J. 183, 184-95 (1979).

with regard to bond, notice, and hearing. Set forth below is a brief statement with regard to the existing remedies mentioned in rule 64, together with a comment upon the constitutional problems from which the particular remedy may suffer.

A. Attachment in Chancery

Mississippi's attachment in chancery statutes[3] were substantially amended in 1980 to eliminate the constitutional deficiencies pointed out by United States district court cases in both the northern[4] and southern[5] districts of Mississippi. The addition of a new section to the act, together with amendments to several other sections,[6] appears to cure the constitutional objections. The procedure now requires judicial monitoring; the bill or affidavit must be presented to the chancellor rather than to the clerk, and only the chancellor may issue the order of attachment.[7] The plaintiff must give security in an amount satisfactory to the chancellor,[8] and there is a provision for an immediate post-seizure hearing for the defendant.[9] In the alternative, the debtor may give security and regain immediate possession of the property attached.[10]

With the changes mentioned above, the attachment in chancery procedure is constitutional on its face. In practice, however, one must be careful to adhere to the *Shaffer v. Heitner*[11] requirement of a nexus between the property seized and the underlying claim. If there is no such nexus, *Shaffer*'s requirement of "minimum contacts" in quasi in rem actions is violated.[12]

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[3] MISS. CODE ANN. §§ 11-31-1 to -11 (Supp. 1981).

[4] *See* M.P.I., Inc. v. McCullough, 463 F. Supp. 887, 895 (N.D. Miss. 1978) (attachment procedure held unconstitutional for failure to meet due process requirements by not offering a prompt hearing either before or after seizure of property).

[5] *See* Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 938 (S.D. Miss. 1977) (attachment statute violated due process).

[6] Act of May 6, 1980, ch. 467, 1980 MISS. LAWS 926 (codified at MISS. CODE ANN. § 11-31-2 (Supp. 1981)) (amending MISS. CODE ANN. §§ 11-31-3, -5, -9 (1972)).

[7] MISS. CODE ANN. § 11-31-2(2) (Supp. 1981).

[8] *Id.* § 11-31-2(2)(c).

[9] *Id.* § 11-31-2(3)(a).

[10] *Id.* § 11-31-2(3)(b).

[11] 433 U.S. 186 (1977).

[12] The scope of this symposium does not permit an in-depth discussion of the

B. Attachment at Law

The 1977 decision of the District Court for the Southern District of Mississippi in *Mississippi Chemical Corp. v. Chemical Construction Corp.*[13] clearly delineated the constitutional objections to the Mississippi attachment at law statutes.[14] First, there is no provision for pre-attachment notice or hearing.[15] Second, writs of attachment may be authorized by a nonjudicial officer.[16] Third, there is no provision for an immediate post-attachment hearing on the validity of the attachment.[17]

At the conclusion of the 1981 session of the Mississippi Legislature, there had been no legislation to correct these constitutional flaws.

C. Replevin

The Fifth Circuit Court of Appeals, in a 1972 memorandum opinion, held that the Mississippi replevin statutes,[18] as they then existed, violated the due process clause because they failed to provide a hearing before seizure.[19] Ostensibly in response to the Fifth Circuit's decision, the Mississippi Legislature amended the replevin statutes in 1975.[20] The changes appear to have been made to make the statutes accord with Louisiana's sequestration statutes, which received constitutional approval in *Mitchell v. W. T. Grant Co.*[21] in 1974.

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ramifications of the *Shaffer v. Heitner* decision. For a rather thorough treatment of the subject, see Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 62-79 (1978); Comment, *Shaffer v. Heitner: The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction*, 35 Wash. & Lee L. Rev. 131, 142-52 (1978).

[13] 444 F. Supp. 925 (S.D. Miss. 1977).

[14] Miss. Code Ann. §§ 11-33-1 to -107 (1972).

[15] Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 940 (S.D. Miss. 1977).

[16] *Id.* at 941.

[17] *Id.* at 942.

[18] Miss. Code Ann. §§ 11-37-1 to -57 (1972) (repealed by Act of April 8, 1975, ch. 508, 1975 Miss. Laws 807).

[19] Turner v. Colonial Fin. Corp., 467 F.2d 202, 202 (5th Cir. 1972).

[20] Act of April 8, 1975, ch. 508, 1975 Miss. Laws 807 (codified at Miss. Code Ann. §§ 11-37-101 to -157 (Supp. 1981)) (repealing Miss. Code Ann. §§ 11-37-1 to -57 (1972)).

[21] 416 U.S. 600 (1974).

D. Claim and Delivery

The claim and delivery procedure,[22] enacted in 1973, is rather new to Mississippi. Unlike a replevin suit, the claim and delivery procedure requires a preliminary hearing[23] to determine the right to temporary possession before personal property may be seized. Thus, there appear to be no constitutional problems with this type of action. Claim and delivery is more comprehensive than replevin, and an important goal of claim and delivery is to ensure resolution of the entire controversy in one suit.[24]

E. Sequestration

The Mississippi sequestration statutes[25] purport to allow a complainant the right of pretrial seizure of personal property. This seizure may be accomplished upon affidavit that the property is in danger of concealment or removal from the state[26] and upon complainant's posting of a bond equal to double the value of the property.[27]

In 1979, the District Court for the Northern District of Mississippi held[28] the Mississippi sequestration statutes to be violative of the fourteenth amendment. The statutes were ruled unconstitutional for the same reasons that the Georgia garnishment statutes were struck down by the United States Supreme Court in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[29]

Through the 1981 session of the Mississippi Legislature, there had been no enactments to deal with these constitutional objections to the sequestration statutes.

F. Ne Exeat

The function of the writ of ne exeat is to detain the person

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[22] MISS. CODE ANN. §§ 11-38-1 to -9 (Supp. 1981).

[23] *Id.* § 11-38-5.

[24] Magee v. Griffin, 345 So. 2d 1027, 1030-31 (Miss. 1977).

[25] MISS. CODE ANN. §§ 11-29-1 to -13 (1972).

[26] *Id.* § 11-29-3.

[27] *Id.* § 11-29-5.

[28] Keelon v. Davis, 475 F. Supp. 204, 205 (N.D. Miss. 1979).

[29] 419 U.S. 601 (1975). For a good discussion of the notice and hearing deficiencies of the Georgia pretrial garnishment procedure, see 1975 WIS. L. REV. 860.

of the defendant within the state so that he may be subject to the processes of the court and may be compelled personally to perform the orders and judgments of the court. It is issuable only where the right of the plaintiff against the "defendant is coupled with a positive personal duty on the part of the defendant, . . . which duty no other person can be compelled effectually to perform."[30] The writ of ne exeat is still a valuable tool that seems to be used almost exclusively in domestic relations cases.[31] This author believes that the ne exeat procedure definitely flirts with the due process problems mentioned above, but that in proper circumstances, if an immediate right to a hearing is provided, ne exeat should withstand constitutional attack. Nevertheless, it is suggested that one should be very circumspect about requesting such extreme relief.

II. Rule 65—Injunctions

Rule 65 makes no change in either the type of injunctive relief available in Mississippi or the injunctive powers heretofore vested in the circuit and chancery courts. Consequently, hearings on injunctive matters will continue to be held in chancery court. There are, however, changes in the vernacular to be used. Also, there are important changes in the procedures and timing involved in obtaining injunctive relief.

With regard to vernacular, we will henceforth be talking in terms of temporary restraining orders,[32] preliminary injunctions, and final or permanent injunctions.[33] One should note that except for those rules that apply generally to all civil actions, rule 65 is the only rule that need be consulted when preparing an application for a temporary restraining order or for an injunction.

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[30] Johnson v. Johnson, 189 Miss. 561, 568, 198 So. 308, 309 (1940).

[31] *See, e.g.*, Johnson v. Barnett, 235 Miss. 285, 290, 108 So. 2d 880, 883 (1959) (writ used against husband by wife in divorce action); Blount v. Blount, 231 Miss. 398, 434, 95 So. 2d 545, 562 (1957) (same); Gibson v. State *ex. rel.* Clark, 220 Miss. 39, 44, 20 So. 2d 30, 32 (1954) (same).

[32] Miss. R. Civ. P. 65(b).

[33] *Id.* 65(a).

A. Temporary Restraining Order Without Notice

A temporary restraining order (TRO) may be granted without notice to the adverse party or his attorney.[34] The TRO without notice is essentially equivalent to the previous injunction without notice. There appears to be no real change in the standard for granting such extraordinary relief. Previously, an injunction without notice would issue only in cases of "extreme emergency to prevent irreparable injury."[35] To obtain a TRO without notice under rule 65(b), one must clearly show "that immediate and irreparable injury, loss, or damage will result to the applicant." Although worded differently, it is submitted that the old and new standards are substantially the same and that the TRO without notice will be available in the future in the same situations in which the injunction without notice was available in the past.

There are some important pleading requirements to which one must adhere in applying for a TRO without notice. Specific facts of the immediate and irreparable injury must be shown by affidavit or verified complaint.[36] These requirements must be kept in mind for both are contrary to the general requirements for pleadings under the rules. The general pleading requirements call for notice pleading,[37] as opposed to fact pleading, and ordinarily pleadings need not be verified or accompanied by an affidavit.[38]

A mere apprehension of irreparable harm is not sufficient. The facts pled in the affidavit should recite precisely what irreparable harm will occur if the defendant is not restrained.[39] Further, the applicant's attorney must certify in writing to the court the efforts that have been made to give notice and the reasons why notice should not be required.[40]

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[34] *Id.* 65(b).

[35] V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 445 (2d ed. 1950).

[36] MISS. R. CIV. P. 65(b).

[37] *Id.* 8(a).

[38] *Id.* 11(a).

[39] *See* Nussbaum, *Temporary Restraining Orders and Preliminary Injunctions—The Federal Practice*, 26 SW. L.J. 265, 266 (1972) (affidavit should show precise harm).

[40] MISS. R. CIV. P. 65(b).

Time factors are crucial in the application for a TRO without notice. Every TRO granted without notice must be endorsed with the date and hour of issuance, and the order must define the injury and state why the injury is irreparable and why the order was granted without notice.[41] Also, a TRO without notice must expire by its own terms no longer than ten days after entry except in domestic relations cases. The ten-day period may, however, be extended for a like period for good cause shown to the court or upon consent of the restrained party.[42]

If a TRO is granted without notice, a motion for preliminary injunction must be set for hearing at the earliest possible time as a preference matter on the docket. It is suggested that the TRO itself should set a date for the preliminary injunction hearing.[43] Due to the exigency of this type of matter, the party restrained without notice is entitled to a hearing on a motion to dissolve or to modify on two days notice, or less by order of the court.[44] It should be noted that this special two-day notice requirement differs from rule 6(d), which requires five days notice for hearings on motions generally.

An interesting question is raised as to whether rule 6(a), which states, "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation," will be applied to the two-day notice requirement of rule 65(b). It is submitted that since the TRO without notice is patently an emergency measure, the rule 6(a) time exclusion clause should not be applied to the rule 65(b) requirement of only two days notice of hearing to dissove or to modify.

There are some acute practical reasons for the practicing attorney to study carefully the special procedures outlined above for obtaining a TRO without notice. If you are faced with an emergency situation, such as stopping a mortgage foreclosure that is to occur that very day, then time is obviously of the essence. It could be embarrassing as well as costly to appear before

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[41] *Id.*

[42] *Id.*

[43] Nussbaum, *supra* note 39, at 270.

[44] Miss. R. Civ. P. 65(b).

the judge with an improper pleading. The time lost in redrafting your pleadings or in locating your affiant and someone authorized to administer oaths could allow the status quo to shift completely in favor of your adversary. This is an area in which one must be careful to avoid the technical pitfalls by studying the procedures in advance.[45]

B. Preliminary Injunction and TRO With Notice

Rule 65(a) deals with the procedure for applying for a preliminary injunction and states initially that no preliminary injunction shall be issued without notice to the adverse party.[46] In explaining the preliminary injunction under the federal rules, Wright and Miller define it as: "an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. Thus, the court may issue a preliminary injunction, even though plaintiff's right to permanent relief still is uncertain."[47]

Before requesting injunctive relief, it is wise to compare carefully the preliminary injunction to the TRO with notice. The two actions are similar in appearance, but they have some subtle differences as used in the federal courts. Since the circumstances under which a preliminary injunction should be issued are not set forth in the federal rules, the matter is governed by the discretion of the trial court.[48] Generally, a preliminary injunction will endure until completion of the trial on the merits, while the TRO, even with notice, is viewed as a short-term remedy. The different perspective upon the two remedies can cause important tactical consequences, but the limited scope of this symposium prohibits a discussion of such considerations.[49]

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[45] For an excellent discussion of points to consider in drafting a TRO, see Nussbaum, *supra* note 39, at 267.

[46] MISS. R. CIV. P. 65(a)(1).

[47] 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2947 (1973).

[48] *Id.*

[49] For an excellent discussion of tactical considerations in choosing between a request for a preliminary injunction or a TRO with notice, see Nussbaum, *supra* note 39, at 269-71.

C. Security

Security is required for all TROs and preliminary injunctions, although at the court's discretion security may not be required in domestic relations actions.[50] Security is fixed by the court "for the payment of such costs, damages and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."[51] It should be noted that rule 65(c) differs from its federal counterpart[52] and the existing Mississippi statute[53] as to bonds for injunction; the Mississippi rule specifically allows recovery of attorney's fees, while the others make no mention of attorney's fees.

D. Specificity Requirement

Every TRO[54] and every order granting an injunction[55] must set forth the reasons for its issuance and must be specific in its terms. Every such order must also describe in reasonable detail, without reference to the complaint or any other document, the act or acts sought to be restrained. The obvious purpose of these requirements is to ensure that the defendant knows what the court is mandating that he do or refrain from doing.[56]

III. Rule 65.1—Security: Proceedings Against Sureties

Whenever one becomes a surety for the actions of a party, rule 65.1 provides that by entering into the bond, stipulation, or other undertaking, the surety irrevocably appoints the clerk of the court as his agent for the service of any papers affecting the liability.

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[50] Miss. R. Civ. P. 65(c). Rule 65(c) does not require the State of Mississippi, its officers, or its agencies to comply with this requirement. *Id.*

[51] *Id.*

[52] Fed. R. Civ. P. 65(c).

[53] Miss. Code Ann. § 11-13-5 (1972).

[54] Miss. R. Civ. P. 65(d)(1).

[55] *Id.* 65(d)(2).

[56] *Cf.* 11 C. Wright & A. Miller, *supra* note 47, § 2955 ("[t]he drafting standard established by Fed. R. Civ. P. . . . 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed").

Previous practice required the issuance of a writ of scire facias to be served upon the surety.[57] Now, under rule 65.1, the action against the surety may be commenced on motion without the necessity of an independent action or the issuance of a separate writ.[58]

IV. RULE 66—RECEIVERS

Rule 66 provides that once a receiver has been appointed, he cannot be dismissed without court order. Even though prior practice permitted a voluntary nonsuit without leave of court at any time up until the jury retired to consider its verdict,[59] such practice does not appear to have been applied to receiverships. There are no reported cases in Mississippi that deal with the precise subject of rule 66, but the statutes that govern receiverships clearly place the receiver under the power of the chancery court and imply that even prior to rule 66 a receiver could not be dismissed without an order of the court.[60] Consequently, rule 66 appears to make no change in actual practice throughout the state.

V. RULE 67—DEPOSIT IN COURT

Rule 67 allows a party to deposit with the court sums of money or property capable of delivery. The rule seems to be a good addition since it authorizes the judge to allow money paid into the court to be deposited at interest in a federally insured bank or savings and loan association authorized to receive public funds. Experience under the very similar federal version of rule

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[57] *See* UNIFORM MISSISSIPPI CIRCUIT COURT RULE 1.08 (Aug. 10, 1979) ("[j]udgments on forfeited recognizances or bonds will not be set aside unless it be made to appear to the court that the default was unavoidable and final judgment will be rendered at the term to which the scire facias is returned executed"); *see also* Carlton, *Scire Facias and Executions*, 24 MISS. L.J. 124 (1952) (same).

[58] MISS. R. CIV. P. 81(e) eliminates the vernacular of the previous writ practice in Mississippi by providing that the forms of relief formerly provided by a number of named writs, including fieri facias and scire facias, as well as all other writs shall be obtained by motions or actions seeking such relief.

[59] MISS. CODE ANN. § 11-7-125 (1972). *But cf.* MISS. R. CIV. P. 41 (voluntary nonsuits require leave of court for a dismissal without prejudice at any time after service of an answer or of a motion for a summary judgment, whichever occurs first).

[60] *See* MISS. CODE ANN. § 11-5-161 (1972) (appointment and dismissal of receiver).

67, however, has shown that there are not many occasions for applying the rule.[61] Obviously, the rule is intended to apply only in cases where the party asking leave to tender the money or thing is a mere stakeholder. Depositing the money or property with the court in such a situation could be very beneficial to the stakeholder, who would then be relieved of responsibility for the item and should be relieved of any further obligation to pay interest on the res from the time of such deposit.[62]

VI. Rule 68—Offer of Judgment

The obvious purpose of rule 68 is to encourage settlements of lawsuits. Mississippi has long had a statutory scheme that allows defendants to attempt settlement through the court by actually paying into court the sum of money offered to conclude the litigation.[63] Rule 68 operates quite differently; now the defendant need only serve upon the adverse party an offer to allow judgment to be taken against him. There is no requirement that money or property be paid into court. Like the existing statute,[64] rule 68 provides that the costs accruing after such offer shall be borne by the plaintiff if the offer is not accepted and "[i]f the judgment finally obtained by the offeree is not more favorable than the offer."[65] The quoted language has caused quite a bit of consternation and litigation in the federal arena because defendants have made what appear to be nominal or sham offers of judgment to trigger the cost-shifting provision of rule 68 and to saddle the plaintiff with all costs incurred after the offer.[66] The position of defendants in this argument is that rule 68 has no requirement of reasonableness or good faith with regard to the offer and that operation of the rule deprives the trial court of its

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[61] *See* 12 C. Wright & A. Miller, *supra* note 47, § 2991 (federal experience with rule).

[62] *See* Reliable Marine Boiler Repair, Inc. v. Mastan Co., 325 F. Supp. 58, 64 (S.D.N.Y. 1971) (where stakeholder deposited res with the court, unsuccessful claimant to the fund not required to pay interest on the fund).

[63] Miss. Code Ann. § 11-7-113 (1972).

[64] *Id.*

[65] Miss. R. Civ. P. 68.

[66] For an excellent discussion of the history of this problem under Fed. R. Civ. P. 68, see Delta Air Lines, Inc. v. August, 101 S. Ct. 1146, 1148 (1981), *noted in* 51 Miss. L.J. 599 (1980-1981).

discretion[67] under rule 54 to disallow costs to the prevailing party.[68]

If the token offer of judgment should become a problem in Mississippi, one author has suggested a short amendment to the rule, which appears to be a workable solution to the problem.[69] The amendment would overtly introduce judicial discretion into the cost-shifting provision of rule 68.[70] If amended as suggested, one would have to show abuse of discretion in order to overturn a decision by the trial judge not to shift the costs, even though plaintiff did not recover more than the offer. Such a standard would invite few hearings or appeals over such rulings by the trial judge.

The mechanics of rule 68 are very simple, and the rule should be widely used; the defendant takes no risk by tendering an offer of judgment in any amount for which he would be willing to settle. Rule 68 merely formalizes a settlement offer, and if plaintiff then recovers less than the offer, plaintiff must pay costs incurred after the offer. The offer of judgment must be made more than fifteen[71] days before the trial begins. An acceptance of the offer must be made in writing within ten days after service of the offer or the offer shall be deemed withdrawn. Of course, evidence of such a withdrawn offer is not admissible except in a proceeding to determine costs.

VII. RULE 69—EXECUTION

Rule 69(a) states expressly that procedures for enforcement of judgments shall remain as provided by statute. Rule 69(b)

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[67] MISS. R. CIV. P. 54(d) (emphasis added) provides, "Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party *unless the court otherwise directs* . . . ."

[68] *See* Delta Air Lines, Inc. v. August, 101 S. Ct. 1146, 1158 (1981) (Rehnquist, J., dissenting) (cost to prevailing party).

[69] 1978 DUKE L.J. 889, 889-98.

[70] *Id.* at 897 n.48. "The amendment would only require the introduction into the rule of the italicized phrase: If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must, *unless the court otherwise directs*, pay the costs incurred after the making of the offer." *Id.*

[71] Note that MISS. R. CIV. P. 68 differs from FED. R. CIV. P. 68 in that under the federal rule, the offer may be made at any time more than 10 days before the trial begins.

deals with examination of a judgment debtor by a judgment creditor and makes only one change from the statute[72] that has authorized such examination since 1977. Under the statute, only the judgment debtor could be examined, while under rule 69(d), the examination may be of the judgment debtor or of any other person.

VIII. Rule 70—Judgment for Specific Acts: Vesting Title

Rule 70 details the power of the court to effect execution of instruments or delivery of possession of property when such act has been directed by a judgment of the court. Thus, the rule applies only after judgment is entered.

Rule 70(b) provides that in lieu of directing a conveyance of real or personal property within the state, the court may enter a judgment divesting the title of any party and vesting it in others.[73] It is submitted that rule 70(b) is not intended to change the line of Mississippi decisions holding that the chancery court has no authority in a divorce action to divide the real property belonging to one spouse so as to give the other spouse a title interest in the property as alimony.[74] This rule is a substantive point of law. To allow transfer of title to real property as alimony would give Mississippi the appearance of being a community property state. This author suggests that the rule does not intend such a result and that rule 70(b) will not be interpreted in such a manner by the Mississippi Supreme Court. Of course, the court will continue to have full power to impress a lien upon one spouse's real property to insure payment of ali-

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[72] Miss. Code Ann. § 13-1-261 (Supp. 1981).

[73] It appears that a judgment or decree has previously operated under Miss. Code Ann. § 11-5-85 (1972) just as described in Miss. R. Civ. P. 70(b). Miss. Code Ann. § 11-5-85 (1972) states:

> When a decree shall be made for a conveyance, release or acquittance, or other writing, and the party against whom the decree is made shall not comply therewith, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect, and shall be as available, as if the conveyance, release, or acquittance, or other writing had been executed in conformity to the decree; or the court may appoint a commissioner to execute such writing, which shall have the same effect as if executed by the party.

[74] *See, e.g.*, Pierce v. Pierce, 267 So. 2d 300, 301-02 (Miss. 1972) (chancery court has no authority to divest title to real property in divorce).

mony. As a matter of fact, a recent Mississippi decision has even allowed a lien against one spouse's land to secure future alimony payments.[75]

IX. Rule 71—Process in Behalf of and Against Persons Not Parties

Rule 71 allows a person who is not a party to an action, but who is properly affected thereby, to enforce obedience to the order by the same process as if he were a party. The rule has not been used often at the federal level.[76] An example of the way in which rule 71 may be used would be for a court to order property to be delivered to the possession of a person who is not a party. The third person may enforce the order by the same process as if he were a party.[77] Additionally, orders of the court may be made *against* a person not a party to the action under various rules, such as 30(d) and 37(a), and a person under such order is liable to the same process as if he were a party.[78]

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[75] Morgan v. Morgan, 397 So. 2d 894, 895 (Miss. 1981).

[76] *Cf.* 12 C. Wright & A. Miller, *supra* note 47, §§ 3032-3033 (federal application of rule).

[77] K. Sinclair, Federal Civil Practice 900 (1980).

[78] *Id.* at 901.

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COMMENTS

THE DES DILEMMA: AN ANALYSIS OF RECENT DECISIONS

Manufacturers and products liability insurers are under seige. Because products liability judgments against manufacturers have increased five- or six-fold over the last five years,[1] the cost of products liability insurance has dramatically increased.[2] Arguing that these costs threaten to force them out of business, many companies have demanded legislation limiting their exposure to liability.[3] Several state legislatures have responded to this demand by passing reform legislation.[4] In addition, the United States Department of Commerce has compiled and offered to the states a Model Uniform Product Liability Act.[5]

This clamor for reform is attributable in part to judicial changes in the law of products liability. Some courts' willingness to reformulate the law is illustrated by their handling of the cases involving claims of

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[1] Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293, 294 (1979).

[2] Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 678 (1978).

[3] *Id.*

[4] The most common legislation restricts the period of time during which an action may be brought against a manufacturer. *E.g.*, ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1978) (two-year statute of limitations for products liability action); TENN. CODE ANN. § 29-28-103 (1980) (six-year statute of limitations for products liability actions). Although Mississippi has no specific statute of limitations for products liability actions, the Mississippi Supreme Court in Ford Motor Co. v. Broadway, 374 So. 2d 207, 209 (1979), held that the six-year limitation of MISS. CODE ANN. § 15-1-49 (1972) applies to products liability actions.

[5] U.S. Dep't. of Commerce, Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (Oct. 31, 1979). This model act was formulated to counter rapidly rising insurance rates and to bring some uniformity to products liability law as applied by the states. *See generally* Davis, *Product Liability Under Section 402A of the Restatement Second of Torts and the Model Uniform Product Liability Act*, 16 WAKE FOREST L. REV. 513, 514 (1980); *Student Forum on the Model Uniform Product Liability Act*, 49 U. CIN. L. REV. 111, 111-13 (1980).

injury from use of the generic drug diethylstilbestrol (DES).[6] Several cases involving DES injuries have gone to trial,[7] and many more will soon be filed.[8] DES manufacturers potentially are liable for billions of dollars in damages. In many instances, however, plaintiffs' recoveries have been hampered because of their inability to identify the manufacturer of the DES they used. To overcome this problem, some courts and commentators have formulated novel causation theories, such as "enterprise liability"[9] and "market share liability,"[10] in addition to the more traditional joint liablity principles.[11]

The leading case in this area is *Sindell v. Abbott Laboratories.*[12] There the California Supreme Court held that five manufacturers of DES were liable for a plaintiff's injuries even though the plaintiff could not trace her injury to any particular manufacturer. The court reasoned that since the five manufacturers held a substantial share of the DES market, there was a corresponding likelihood that they produced the DES that caused the plaintiff's injuries.[13]

This comment examines the liability and practicality of the novel theories of causation advanced in the DES cases. Do these theories protect the rights of DES plaintiffs and afford them just compensation for their injuries, or, conversely, does recovery under these theories unjustly penalize DES manufacturers by holding them liable without adequate proof of causation? In addressing these questions and related topics, this comment will review the historical development of products liability litigation and the traditional requirements governing burden

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[6] Diethylstilbestrol is a man-made estrogen that was prescribed for and taken by pregnant women from 1947 to 1971, to prevent spontaneous abortion and for other purposes. In 1971 a statistical link was found between DES and subsequent development of cancer in daughters of DES users. *See generally* Comment, *DES and a Proposed Theory of Enterprise Liability,* 46 FORDHAM L. REV. 963, 964 (1978).

[7] *See infra* notes 82 through 168 and accompanying text.

[8] In 1977, 80 to 100 DES cases were pending. Comment, *supra* note 6, at 967. Conservative estimates indicate over 500,000 women ingested DES during pregnancy. *Id.* at 965.

[9] *See generally* Comment, *supra* note 6, at 974-75 (enterprise liability describes imposition of joint and several liability on several manufacturers of a defective product where injury is delayed and instrumentality and manufacturer are unknown); Comment, *Industry-Wide Liability,* 13 SUFFOLK L. REV. 980, 982 (1979) (same).

[10] *See generally* Berns and Lykos, *Sindell v. Abbott Labs—"The Heir of the Citadel,"* 15 FORUM 1031, 1031 (1980) (discussion of market share liability); 4 AM. J. TRIAL ADVOCACY 492, 496 (1980) (same).

[11] Other traditional theories include alternative liability and concert of action. For a discussion of these theories, see *infra* notes 52-75 and accompanying text.

[12] 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980).

[13] 26 Cal. 3d at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145.

of proof and causation. It will then discuss the courts' application of these principles in the DES cases and the probable effects of these decisions. Finally, it concludes that the new theories of causation adopted in some DES cases will have a detrimental effect on both manufacturers and consumers. This comment also suggests that the DES issue and others like it should be dealt with by the federal or state legislatures, rather than the courts.

I. Products Liability: Historical Background

Historically, a party injured by a defective product had no recourse against the manufacturer of that product unless the parties were in privity of contract.[14] Since purchasers down the chain of distribution or innocent bystanders were not in privity with the manufacturer, they could not, in most cases, sue the manufacturer of a defective product in tort for personal injury.[15] The privity doctrine originated in the courts of England. The seminal case was *Winterbottom v. Wright*.[16] In *Winterbottom*, the plaintiff drove a stagecoach for the owner and was injured when the coach collapsed. The defendant had contracted with the owner to keep the coach in safe operating condition.[17] The court held that, since the defendant and the plaintiff were not in privity of contract, the plaintiff had no cause of action.[18]

Over the years the courts formulated a number of exceptions to the privity doctrine.[19] Recovery in the absence of privity was first al-

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[14] *See* W. Prosser, Law of Torts § 96, at 641-42 (4th ed. 1971) (discussion of privity requirement).

[15] R. Epstein, Modern Products Liability Law 10 (1980).

[16] 152 Eng. Rep. 402 (Ex. 1842).

[17] *Id.* at 403.

[18] *Id.* at 405. The general rule of privity apparently developed from the language of Lord Abinger's opinion that: "[W]e should be working this injustice, that after the defendant has done everything to the satisfaction of his employer, and after all matters between them had been adjusted . . . we should subject [the defendant] to be ripped open by this action of tort . . . ." *Id.* Lord Abinger focused only on whether an action would lie in contract; subsequent courts mistakenly interpreted the case to mean that no action would lie in tort in the absence of privity. *See* W. Prosser, *supra* note 14, § 93 (*Winterbottom* not intended to limit recovery in tort). By confining the duty of reasonable care to privity of contract, the *Winterbottom* court assumed that industrial growth would be hampered if it had to pay for any and all injuries caused by defective products. *See* Traynor, *The Way and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 364 (1965) (discussion of Winterbottom).

[19] Proof of privity was not required where a manufacturer's negligence placed a party in imminent danger of life or health in the sale of an inherently dangerous product, where an owner's negligence caused injury to a party invited to use a defective product, or where the manufacturer sold an imminently dangerous product without notice of the

lowed in cases involving food products[20] and later for injuries caused by drugs, tobacco, and kerosene.[21] *MacPherson v. Buick Motor Co.*,[22] a 1916 New York decision, allowed recovery without privity for injury resulting from a defective automobile. In *MacPherson,* the plaintiff was injured when a defective automobile wheel collapsed while he was driving the car.[23] The court reasoned that since a defect in the wheel was foreseeable, the manufacturer owed a duty of care to the ultimate consumer. Because this duty arose from the law of torts, the contract doctrine of privity did not bar the action.[24]

Over the next half century, the *MacPherson* doctrine was adopted in all of the states; Mississippi was the last state to recognize the doctrine officially.[25] The "citadel" of privity did not fall completely,[26] however, until the New Jersey Supreme Court's 1960 decision in *Henningsen v. Bloomfield Motors, Inc.*[27] There the plaintiff, who was not in privity with the defendant, was injured when the new car she was driving crashed because of a defective steering mechanism.[28] The court allowed recovery, reasoning that an implied warranty of fitness accompanied the car into the hands of the buyer.[29] Lack of privity did not bar the plaintiff's right to recover, even though the action sounded in con-

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danger. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870-71 (8th Cir. 1903).

[20] *E.g.*, Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 866, 64 So. 791, 791 (1914) (liability for negligence for mouse in bottle); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633, 636 (1913) (defendant held liable in negligence and implied warranty for plaintiff's injuries from contaminated food). *See generally* Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103-10 (1960).

[21] *E.g.*, Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118, 119 (1889) (poisoned medicine); Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 500, 78 So. 365, 366 (1918) (human toe in tobacco plug); Peterson v. Standard Oil Co., 55 Or. 511, 106 P. 337, 339-40 (1910) (defective kerosene).

[22] 217 N.Y. 382, 111 N.E. 1050 (1916).

[23] 111 N.E. at 1051.

[24] *Id.* at 1053.

[25] The first major decision adopting the *MacPherson* doctrine was Johnson v. Cadillac Motor Car Co., 261 F. 878, 882, 886-87 (2d Cir. 1919).

The Mississippi Supreme Court leaped over the *MacPherson* decision to find strict liability in tort in State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 116 (Miss. 1965), *cert. denied,* 386 U.S. 912 (1966). *See also* Necaise v. Chrysler Corp., 335 F.2d 562, 569-73 (5th Cir. 1964)(concluding that the Mississippi Supreme Court would follow *MacPherson*); Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291, 295-97 (5th Cir. 1962) (same).

[26] *See generally* Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 791 (1966).

[27] 32 N.J. 358, 161 A.2d 69 (1960).

[28] 161 A.2d at 75.

[29] *Id.* at 76.

tract rather than tort.[30]

Although the widespread adoption of the Uniform Commercial Code (UCC) furnished a mechanism for the retention of some form of privity limitation in warranty actions,[31] *Henningsen* sounded the death knell for the privity doctrine.[32] In a majority of the states, proof of privity was abandoned as a prerequisite for recovery in products liability actions.[33]

There remained, however, another problem. When actions were brought on warranties, many courts allowed manufacturers to escape liability by relying on traditional contract defenses, such as failure to give timely notice of the breach.[34] In 1963, the California Supreme Court addressed this problem in *Greenman v. Yuba Power Products*.[35] There the manufacturer of a defective power tool contended that the plaintiff, who had been injured while using the tool, had failed to give timely notice of his warranty claim.[36] The court dismissed this defense, reasoning that since the defendant's liability was governed by the law of strict liability in tort rather than the law of contract warranty,[37] the plaintiff's failure to give timely notice did not preclude his recovery.[38]

Like *Henningsen, Greenman* was embraced by other jurisdictions; soon a majority of the courts had discarded the term "warranty."[39]

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[30] *Id.* at 83.

[31] *See generally* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE §§ 11-2 to 11-7 (2d ed. 1980).

[32] *See generally* W. PROSSER, *supra* note 14, § 97.

[33] *See, e.g.*, Spence v. Three Rivers Builders & Masonry Supply Co., 353 Mich. 120, 90 N.W.2d 873-78 (1958) (privity not essential for recovery in breach of implied warranty); Goldberg v. Kollsman Instrument Co., 12 N.Y.2d 432, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 594 (1963) (same). A majority of jurisdictions in the United States now reject the requirement of privity in a products liability context. *See generally* 2 L. FRUMMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 16.02(2)(b), 16.04(1) (1978).

[34] Many difficulties hampered the application of contracts concepts to tort actions. Warranty became so closely identified with a contract between parties that reasonable notice of breach of warranty and disclaimer availability to the seller were required in some jurisdictions. W. PROSSER, *supra* note 14, § 97. Lack of privity, failure to give timely notice, and sellers' rights to disclaimer were valid defenses in some jurisdictions. *E.g.*, Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497, 500 (1st Cir. 1962) (disclaimer held an effective defense to products liability action); Owen v. Sears, Roebuck & Co., 273 F.2d 140, 143 (9th Cir. 1959) (timely notice required in products warranty action).

[35] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[36] 377 P.2d at 899; 27 Cal. Rptr. at 699.

[37] *Id.* at 899; 27 Cal. Rptr. at 699.

[38] *Id.* at 900; 27 Cal. Rptr. at 700.

[39] *See, e.g.*, Putman v. Erie City Mfg. Co., 338 F.2d 911, 919-20 (5th Cir. 1964) (strict liability adopted without warranty); Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 849-50 (5th Cir. 1967) (same).

Changes occurred so rapidly that the American Law Institute redrafted section 402A of the Restatement (Second) of Torts three times.[40] The final draft omitted the term "warranty,"[41] thereby removing the problems posed by the traditional contract defenses.

By the late 1960's, most states, including Mississippi, had accepted section 402A.[42] Privity no longer barred recovery.[43] Futhermore, the liberal use of res ipsa loquitur, coupled with the application of a higher standard of care in negligence actions against manufacturers, practically eliminated the differences between a recovery in negligence and one in strict liability.[44]

II. Proof of Causation

A. *The Identification Requirement*

Section 402A does not relieve the plaintiff of the burden of proving that the product that caused his injuries was manufactured by a

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[40] W. Prosser, *supra* note 14, § 98.

[41] Restatement (Second) of Torts § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment k implies that a properly prepared drug, accompanied by proper directions and warning is not unreasonably dangerous nor defective. The seller of such drugs should not be held liable for unfortunate consequences attending the supply of the public with the useful and desirable product with a known but reasonable risk. *See* Merrill, *Compensation for Prescription Drug Injuries*, 59 Va. L. Rev. 1, 31 (1973) (comment k restores the duty to warn and thus a duty of reasonable care); *see also* Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2d Cir. 1969) (comment k incorporates ordinary negligence duty to warn); Cudmore v. Richardson-Merrell, 398 S.W.2d 640, 644 (Tex. Civ. App. 1965) (applying duty of reasonable care to drug injury action), *cert. denied*, 385 U.S. 1003 (1967).

[42] *See* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1965) (adopting section 402A), *cert. denied*, 386 U.S. 912 (1966).

[43] *See supra* notes 31-33 and accompanying text.

[44] *See generally* Epstein, *Product Liability: The Search for the Middle Ground*, 56 N.C.L. Rev. 643, 647 (1978).

particular manufacturer.[45] Both in Mississippi[46] and other jurisdictions,[47] a plaintiff must prove that the product was defective, that the defect caused the injury, and that the defect existed when the product left the manufacturer. Traditionally, the failure to prove any of these elements defeated the plaintiff's case.[48]

B. Joint and Several Tortfeasors

Where several manufacturers produce an identically defective product, a plaintiff injured by that product may bring suit based on joint and several liability. The four theories of recovery available in such a situation are concert, common duty, vicarious liability, and alternative liability.[49] Where, as in *Sindell v. Abbott Laboratories*,[50] a plaintiff cannot trace a defective product to a particular manufacturer, two of these theories may allow recovery without direct proof of identification.[51]

The theory of "double fault and alternative liability"[52] was formulated by the Supreme Court of California in *Summers v. Tice*,[53] a 1948 decision. In *Summers*, the plaintiff was injured when his two hunting

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[45] *See* 2 L. FRUMMER & M. FRIEDMAN, *supra* note 33, § 16A[4][e][i], at 3B-88, -88.1 (bases of liability); W. PROSSER, *supra* note 18, § 103, at 671-72 (same).

[46] *See* Early-Gary, Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974) (elements of proof in products liability case).

[47] *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (plaintiff must prove as an essential element that defendant actually manufactured product causing injury); Wetzel v. Eaton Corp., 62 F.R.D. 22, 29-30 (D. Minn. 1973) (pure speculation and conjecture as to which of two manufacturers provided defective part does not give rise to liability); McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 84-85, 150 Cal. Rptr. 730, 735 (1978) (plaintiff has burden of proving causal relationship between defect and injury). *Contra* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20, 26 (1980) (plaintiff has cause of action in drug injury case without proof of which specific defendant manufactured drug).

[48] *See, e.g.*, William Cooper & Nephews Inc. v. Pevey, 317 So. 2d 406, 409 (Miss. 1975) (plaintiff recovery precluded by failing to prove that the product was defective). The proof of causation requirement remains because technically § 402A is not "strict" liability without fault. If it were, a plaintiff could recover from a manufacturer for any product-related injury, such as a hand cut on a pocket knife or a smashed finger caused by a slip of a hammer. *See generally* Davis, *supra* note 5, at 515.

[49] 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 (1956). *See generally* Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429-33 (1937).

[50] *See supra* text accompanying notes 12-13.

[51] *See* 1 F. HARPER & F. JAMES, *supra* note 49, § 698 (proof of concerted action or alternative liability precludes a showing of cause in fact by plaintiff).

[52] W. PROSSER, *supra* note 14, § 41, at 243.

[53] 33 Cal. 2d 80, 199 P.2d 1 (1948).

companions negligently fired in his direction.[54] It was impossible to ascertain which of the two defendants caused the plaintiff's injuries because the shots were fired simultaneously.[55] On similar facts, other courts had allowed recovery based on a theory of concert of action.[56] The *Summers* court reasoned, however, that this approach strained the concept of concert.[57] Nevertheless, the court concluded that, even though neither the plaintiff nor the defendant could prove causation, justice dictated that the burden of persuasion on causation be shifted from the innocent plaintiff to the tortious defendants.[58] This shift virtually ensured that the plaintiff would recover.[59]

The second theory allowing a plaintiff to recover without proof of causation is concert of action. An action arises in concert when two or more tortfeasors act together to cause a plaintiff's injuries. To recover,

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[54] 199 P.2d at 2.

[55] *Id.* at 3.

[56] *See, e.g.*, Benson v. Ross, 143 Mich. 452, 106 N.W.2d 1120, 1120 (1906) (recovery against three defendants for shotgun wound); Moore v. Foster, 182 Miss. 15, 20, 180 So. 73, 74 (1938) (recovery for gunshot wound from one of two police officers); Oliver v. Miles, 144 Miss. 852, 860, 110 So. 666, 667 (1927) (recovery for injuries where two defendants fired simultaneous shots).

[57] 199 P.2d at 3.

[58] *Id.* at 4-5. The doctrine of justice of *Summers* has been incorporated into the restatement. RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965) provides:

> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon such actor to prove that he has not caused the harm.

The reason given for the shift in proof is that "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." *Id.* comment f.

[59] Although *Summers* offers the best example of alternative liability, two other groups of cases illustrate the theory. The first group consists of multiple car collision cases involving actions by a group of independent tortfeasors that combine to cause indivisible injury to the plaintiff. *See, e.g.*, Eramdjian v. Interstate Bakery Corp., 153 Cal. App. 2d 590, 315 P.2d 19, 29 (1957) (burden of proof of causation shifted where plaintiff cannot prove causation).

Cases involving res ipsa loquitur in a joint tortfeasor context also illustrate alternative liability. The seminal case is Ybara v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). In *Ybara*, the plaintiff awoke from an appendectomy with an unexplained shoulder injury. 154 P.2d at 688. The California Supreme Court held that where the plaintiff was unable to prove which defendant caused his injury, the burden of proof shifted to the defendants, requiring the defendants to overcome an inference of negligence on their part. *Id.* at 691. *Accord* Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1, 5, 7, *cert. denied*, 423 U.S. 929 (1975). *See generally* Comment, *supra* note 9, at 988-90.

the plaintiff must prove that the tortfeasors acted under a common plan or with a tacit understanding to cause the harm.[60] The classic concert of action case arises when one of the participants in an illegal drag race injures a third party. In *Bierczynski v. Rogers*,[61] the plaintiffs were injured when their automobile was struck by one of the illegal racers' automobiles.[62] The Supreme Court of Delaware held all of the racers jointly liable on a theory of concerted action. The court reasoned that since all of the parties engaged in the illegal race were wrongdoers acting in concert, they all should be held liable for the plaintiffs' injuries regardless of which defendant caused the injuries.[63] Group assault cases also illustrate concerted action. In *Thompson v. Johnson*,[64] the plaintiff was assaulted by one defendant while two other defendants watched and prevented plaintiff's wife and mother from coming to his aid.[65] Applying Misissippi law, the United States Court of Appeals for the Fifth Circuit held that since the defendants not actively participating in the assault were acting in a common enterprise with the codefendant, they were jointly liable as well.[66]

The effect of the theories of alternative liability and concert of action is to obviate the requirement that a plaintiff trace cause in fact to a particular defendant. Until recently, neither concert of action nor alternative liability had been applied to products liability actions involving large numbers of joint tortfeasors. The first case to do so was *Hall v. E.I. DuPont De Nemours & Co.*[67] There the plaintiffs sued six blasting cap manufacturers for eighteen separate accidents in which children were injured while playing with unlabeled blasting caps. Since the identity of the manufacturer of the cap was destroyed by the blast, the plaintiffs could not trace cause in fact to a specific manufacturer.[68] The

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[60] The concert of action theory states:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in, or further it by cooperation or request, or who lend aid and encouragement to the wrongdoer, or ratify or adopt his acts done for their benefit, are equally liable with him. Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .

W. PROSSER, *supra* note 14, § 46, at 292; *see also* RESTATEMENT (SECOND) OF TORTS § 876 (1977) (elements of concerted action).

[61] 239 A.2d 218 (Del. 1968).

[62] *Id.* at 220.

[63] *Id.* at 221.

[64] 180 F.2d 431 (5th Cir. 1950).

[65] *Id.* at 433.

[66] *Id.* at 434.

[67] 345 F. Supp. 353 (E.D.N.Y. 1972).

[68] *Id.* at 358.

plaintiffs attempted to overcome this problem by alleging that the manufacturers acted in concert because they failed to place proper warnings on the caps.[69] In response to the defendants' motion to dismiss, the district court held that plaintiffs' allegations raised sufficient issues of law and fact and, therefore, should not be dismissed.[70] The court reasoned that the manufacturers' adherence to an industry-wide safety code developed by their trade association demonstrated that the manufacturers had acted in concert by sharing part of their safety risks.[71] The court concluded, however, that the plaintiffs retained the burden of demonstrating a causal link between their injuries and the manufacturers' joint risk-taking.[72] To meet this burden, the plaintiffs had to demonstrate that the caps that injured them were manufactured by one of the defendants rather than by a foreign manufacturer. The court stated that once this linkage was established the burden shifted to the defendants to prove they were not responsible for the plaintiffs' injuries.[73]

In effect, *Hall* combined the theories of concert and *Summers*-alternative liability into a rationale for industry-wide recovery.[74] This approach has been criticized.[75] One should also note that the DES cases, discussed below, do not raise the same identification issue confronted in *Hall,* because the DES cases offer no supportable allegation that the drug manufacturers acted in concert.

C. Enterprise Liability: A Proposed Theory

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[69] *Id.* at 359.

[70] *Id.* at 386.

[71] *Id.* at 373-74. The *Hall* court used the term "joint control of the risk" to denote concert of action. *Id.* at 371. Although the *Hall* court found no joint venture or profit sharing agreement, there was enough evidence to show joint control by the defendants of the entire blasting cap industry. *Hall* was in tune with the modern trend of imposing liability on manufacturers who permit harmful products to enter the market, without limiting that liability with a burden of precise proof that is impossible for the plaintiff to meet. *See* 2 L. FRUMMER & M. FRIEDMAN, *supra* note 33, § 16A[4][e][iii] (construing *Hall*).

[72] 345 F. Supp. at 379. The defendants in *Hall* argued that the plaintiffs failed to allege such a causal connection by conceding that the caps may have been made by other unnamed foreign manufacturers.

[73] *Id.* at 380.

[74] *See* comment, *supra* note 6, at 997. The combination of the two theories by the court was not logical. The court decided that there was concert of action by the defendants. The court then required a showing by a preponderance of the evidence that the products were produced by one of the defendants. *Id.* at 998-99. Participation in concerted action should require no further proof of causation.

[75] R. EPSTEIN, *supra* note 15, at 158.

A theory of enterprise liability, based in part on *Hall* and developed especially for the DES problem, was advanced in a 1978 student comment printed in the *Fordham Law Review*.[76] The author purported to combine the better features of concert of action and alternative liability into one theory for use in the DES cases. The proposed theory includes seven elements, and where the plaintiff meets all seven successfully, the burden of proof of causation shifts to the defendant manufacturers.[77] Each defendant might exonerate himself from liability only by a showing that its product could not have caused the plaintiff's injuries. The author also proposed that the damages be apportioned among defendants found liable in proportion to their share of the relevant DES market.[78]

The DES cases to date have unanimously rejected the theory of enterprise liability.[79] With the exception of *Sindell*, the decisions have been based instead on the more traditional theories of alternative liability and concert of action.[80]

III. The DES Cases: A Comparative Analysis

A. Initial Efforts

In the typical DES case, the plaintiff cannot trace her injuries to a

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[76] Comment, *supra* note 6, at 974 n.35.

[77] *Id.* at 995-96. The seven elements are:

1. Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendants' conduct.
2. A generically similar defective product was manufactured by all the defendants.
3. Plaintiff's injury was caused by this product defect.
4. The defendants owed a duty to the class of which plaintiff was a member.
5. There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.
6. There existed an insufficient, industry wide standard of safety as to the manufacture of this product.
7. All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.

Id. at 995.

[78] *Id.* at 995-96.

[79] Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 609, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 143, *cert. denied*, 449 U.S. 912 (1980).

[80] *See, e.g.*, Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20, 25-27 (1980) (DES plaintiff held to have cause of action in concert in action and alternative liability theories).

particular manufacturer. She was exposed to the drug while still in her mother's womb, and her injuries were not discoverable until after the passage of time had precluded tracing the DES to a particular manufacturer.[81] In sum, most DES plaintiffs cannot meet the traditional burden of proving causation.

DES plaintiffs' initial failures to consider the ramifications of the causality problem led to the dismissal of several suits. For example, in *McCreery v. Eli Lilly & Co.*,[82] a California appellate court upheld a summary judgment in favor of Eli Lilly.[83] The plaintiff's first complaint named only Eli Lilly as a defendant.[84] On appeal, the plaintiff alleged that all DES manufacturers were jointly and severally liable.[85] The court concluded, however, that without proof of either a link between the plaintiff's injury and the DES manufactured by Eli Lilly or of concert of action, the plaintiff could not recover.[86]

A similar pleading error was made in *Gray v. United States*.[87] The plaintiff sued only one manufacturer[88] and failed to identify the manufacturer as the producer of the DES that caused her injuries.[89]

B. Market Share Liability

The procedural errors mentioned above were avoided in *Sindell v.*

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[81] *See generally* Comment, *Diethylstilbestrol: Extension of Federal Class Action Procedures to Generic Drug Litigation*, U.S.F.L. REV. 461, 461-66 (1980).

[82] 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978).

[83] *Id.* at 87, 150 Cal. Rptr. at 736.

[84] *Id.* at 84-85, 150 Cal. Rptr. at 735.

[85] *Id.*, 150 Cal. Rptr. at 735.

[86] *Id.* at 84, 150 Cal. Rptr. at 735. The court distinguished *Hall* by noting that in *Hall*, liability was not predicated solely upon concerted activities directed toward achieving an economic result. Rather, the blasting cap manufacturers' liability in *Hall* arose from concerted activity that actually caused the plaintiff's use and injury. *Id.*, 150 Cal. Rptr. at 735. In effect, the *McCreery* court considered the concerted activity of the DES manufacturers as simply an attempt to achieve an economic result and not as a tortious activity directed toward the plaintiff. *Id.*, 150 Cal. Rptr. at 735.

[87] 445 F. Supp. 337 (S.D. Tex. 1978).

[88] *Id.* at 342. The plaintiff also had sued the United States Government for its approval, through the Food and Drug Administration (FDA), of DES and its failure to warn of adverse effects. *Id.* The court held that the conduct of the FDA was discretionary under the Federal Tort Claims Act and that, therefore, the FDA was immune from suit. *Id.* at 341-42.

[89] *Id.* at 338. The court found that, even though the plaintiff had ample time to do so, she failed to identify Lilly as the particular manufacturer of the DES taken by her mother. The court ruled that such proof was an essential element of the plaintiff's case. *Id.*

Abbott Laboratories,[90] a class action brought in the California state courts against several DES manufacturers.[91] As in previous DES cases, the named plaintiff could not identify the manufacturer of the DES taken by her mother.[92] She based her claim of joint and several liability, however, on theories of concert of action,[93] alternative liability,[94] and enterprise liability.[95] Ultimately, the California Supreme Court concluded that none of these theories was applicable.[96] Instead of dismissing the case, however, the court, as it has so often in the past, decided to break new ground in products liability law;[97] it formulated a new theory of recovery called "market share liability,"[98] which is discussed below.

The plaintiff's concert of action theory was rejected because the manufacturers' alleged tortious activities—reliance upon each other's testing activities and promotional methods—were not in themselves tortious.[99] The plaintiffs argued that these activities demonstrated a "tacit understanding" among the manufacturers to adopt each other's

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[90] 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

[91] The plaintiff sought certification of a class of women residents of California who were exposed *in utero* to DES and who might or might not know that fact or the dangers to which they were exposed. The suit also asked that the manufacturers be certified as a defendant class. *Id.* at 593 n.1, 607 P.2d at 925 n.1, 163 Cal. Rptr. at 133 n.1. The complaint alleged that the defendant manufacturers knew or should have known that DES was carcinogenic, that they failed to test DES adequately, that they failed to warn users, and that they marketed DES on an unlimited basis rather than as an experimental drug as approved by the DEA. *Id.* at 593, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34.

[92] *Id.* at 595-96, 607 P.2d at 926, 163 Cal. Rptr. at 134.

[93] *Id.* at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.

[94] *Id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

[95] *Id.* at 607, 607 P.2d at 933, 163 Cal. Rptr. at 141.

[96] *See infra* text accompanying notes 99-110.

[97] *Sindell* offered the California Supreme Court a unique opportunity. Previous DES decisions had been decided by lower level appellate courts and thus had little persuasive power. *See, e.g.*, Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20, 24-26 (1979) (reversing summary judgment for defendant and remanding case) (discussed at *infra* notes 162-67 and accompanying text). Moreover, the California Supreme Court has never been reluctant to advance new legal theories in the products liability field.

[98] Judge Richardson coined the term in his dissenting opinion in *Sindell*. 26 Cal. 3d at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146.

Additionally, recent commentaries have used "market share liability" to describe the new theory. *See, e.g.*, 4 AM. J. TRIAL ADVOCACY 493, 493 (1980); 22 FOR THE DEFENSE 18, 18 (1980).

[99] 26 Cal. 3d at 604-05, 607 P.2d at 932, 163 Cal. Rptr. at 140. Dean Prosser has noted: "It is . . . essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with intent to commit a tort, or with negligence." W. PROSSER, *supra* note 14, § 46, at 292.

test results and to give inadequate warnings to consumers.[100] The court responded that manufacturers frequently rely on and imitate their competitors and that this type of parallel conduct was not the kind of direct participation in tortious activity that the concert of action theory was intended to embrace.[101] Accordingly, the court concluded that since the plaintiff had not alleged that the manufacturers had directly participated in or encouraged each other either to test DES inadequately or to give insufficient warnings to consumers, the concert of action theory was inapplicable.[102]

The plaintiff's enterprise liability theory was also rejected. Relying on the authority of *Hall v. E.I. DuPont De Nemours & Co.*[103] and the rationale outlined in the *Fordham* comment,[104] the plaintiff argued that her injuries were caused by the DES manufacturers' adherence to inadequate industry-wide testing, safety, and warning standards.[105] The court noted, however, that the blasting cap manufacturers in *Hall*, unlike the DES manufacturers, had jointly controlled their manufacturing risks by delegating certain safety functions to their trade association.[106] The court also reasoned that since the drug industry's safety standards were established by the Food and Drug Administration, it would be unfair to impose joint liability merely because the manufac-

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[100] 26 Cal. 3d at 604-05, 607 P.2d at 932, 163 Cal. Rptr. at 140.

[101] The court concluded that application of the concert doctrine to the type of parallel activities conducted by the DES manufacturers would render any manufacturer liable for the defective products of an entire industry, even if one defendant could demonstrate that it did not make the product that caused the injury. *Id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141. *But see* Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625, 633 (1981) (parallel activity creates an inference of tacit understanding and therefore is tortious).

[102] 26 Cal. 3d at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141. The court also questioned whether liability based on concert of action could be predicated upon the assistance and encouragement given to one tortfeasor by another pursuant to a tacit understanding not to perform an act. *Id.* at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141.

[103] 345 F. Supp. 353 (E.D.N.Y. 1972) (discussed at *supra* notes 67-75 and accompanying text).

[104] Comment, *supra* note 6, at 995 (discussed at *supra* notes 76-80 and accompanying text).

[105] 26 Cal. 3d at 608, 607 P.2d at 934, 163 Cal. Rptr. at 142.

[106] *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143. The court in *Hall* held that joint control of the risks could be shown in three ways. First, the plaintiffs could prove the existence of joint action and an express agreement regarding safety, the classic concert of action situation. Second, the plaintiffs could show parallel behavior sufficient to support an inference of a tacit agreement. Third, the plaintiffs could show that the defendants, acting independently, adhered to an industry-wide safety standard. 345 F. Supp. at 374.

turers followed federally prescribed standards.[107]

The plaintiff's *Summers*-alternative liability theory was also rejected by the court because, undiluted, the *Summers* rationale did not fit *Sindell's* facts.[108] In *Summers* there were only two possible tortfeasors, and both had been joined. Since it was certain that one of the defendants had caused the plaintiff's injury, it was not unfair to shift the burden of proof of causation to the defendants. In contrast, only five of the two hundred DES manufacturers were joined in *Sindell*.[109] The court reasoned that since the possibility that any one of the five defendants caused the plaintiff's injuries was remote, it would be unfair to shift the burden to the named defendants.[110]

Ultimately, however, the court relied on a modified version of the *Summers* rationale to formulate its theory of market share liability. The court reasoned that since the DES manufacturers joined had produced a substantial share of the DES marketed, there was a corresponding likelihood that the defendants had manufactured the DES that had caused the plaintiff's injuries. Accordingly, the injustice of shifting the burden of proof to the defendants was significantly diminished. The court also noted that the market share concept could be used to apportion damages among the manufacturers.[111]

The court justified its expansion of *Summers* on several grounds. Citing its earlier decisions, the court opined that the rules of products liability law must adapt to the complexities of modern manufacturing.[112] Furthermore, as between an innocent consumer and a negligent

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[107] 26 Cal. 3d at 607, 607 P.2d at 935, 163 Cal. Rptr. at 143. Despite its purported rejection of enterprise liability, the court ultimately incorporated some of the seven criteria listed in the Fordham comment into its market share theory. For example, the comment argued that to meet its standard of clear and convincing proof of causation, a DES plaintiff must demonstrate that the defendants who were joined in the lawsuit held a high percentage of the market at the time of the plaintiff's injury. Comment, *supra* note 6, at 995. This requirement formed the basis for the court's theory of market share liability, even though the comment's clear and convincing proof requirement was dropped in favor of preponderance of the evidence. *See* Berns & Lykos, *supra* note 10, at 1037 (construing *Sindell*).

[108] 26 Cal. 3d at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

[109] The cases vary as to the number of companies that have manufactured or sold DES since 1941. Two cases have cited the number of manufacturers as 300. Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20, 23 (1980); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981).

[110] 26 Cal. 3d at 931, 607 P.2d at 931, 163 Cal. Rptr. at 139 (distinguishing Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948)).

[111] 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

[112] *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citing Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring)).

manufacturer, the latter should bear the cost of injury, especially since it is in a better position to bear those costs.[113]

Sindell radically alters, on broad policy grounds, the plaintiff's burden of proof in products liability actions. By eliminating the traditional requirement that the plaintiff trace the defective product to a particular manufacturer, the court went well beyond the causation exceptions recognized in *Summers*[114] and in the res ipsa loquitur cases.[115] In those cases, unlike *Sindell*, it was absolutely certain that the party that caused the plaintiff's injury was before the court.[116] Furthermore, market share liability, in effect, attributes causation to the product itself. Thus, a defendant manufacturer may be liable for a product he did not produce. Such a theory goes beyond strict liability, indeed, beyond absolute liability. Even under a theory of absolute liability a plaintiff would be expected to demonstrate a causal link between the manufacturer's activity and the plaintiff's harm.[117] Under *Sindell*, manufacturers are liable regardless of not only fault, but also of causation.[118]

Sindell raises more questions than it answers. For instance, the court failed to define what share of the market would create the inference of a likelihood of causation.[119] A key question then becomes which market should be measured—national, regional, state, or other? A DES manufacturer may have held a seventy-five percent market share nationally but only a ten per cent share of the market in which the suit is brought. Furthermore, what period should be used to measure market share — the present market or the share held twenty years earlier? Market share data may not be available for the earlier period.

The majority in *Sindell*, although not unmindful of these ques-

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[113] 26 Cal. 3d at 611-12, 607 P.2d at 936, 163 Cal. Rptr. at 144.

[114] *See supra* text accompanying notes 53-59.

[115] *See supra* note 59.

[116] The same premise was present in Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972). In *Hall*, all United States blasting cap manufacturers were joined as defendants. *Id.* at 358. It was possible that the caps could have been produced by a Canadian manufacturer, but the *Hall* court found that this fact did not affect the plaintiff's recovery. *Id.* at 379. *See also* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20, 22 (1980)(plaintiff alleged that all known manufacturers of DES in Michigan during the relevant time period were joined).

[117] *See, e.g.*, Teledyne Exploration Co. v. Dickerson, 253 So. 2d 817, 818 (Miss. 1971) (proof of causation required regardless of absolute liability for blasting); Central Exploration Co. v. Gray, 219 Miss. 757, 761, 766, 70 So. 2d 33, 35, 37 (1954) (same). *See generally* W. PROSSER, *supra* note 14, § 78, at 505-16.

[118] *See generally* Berns and Lykos, *supra* note 10, at 1036.

[119] 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

tions, argued they were merely problems of proof.[120] The dissent argued more persuasively that these questions were not solely evidentiary because they related to the fundamental question of whether the defendants would ultimately be held liable.[121]

The dissent also pointed out that a plaintiff invoking the market share theory may fare better than a plaintiff who can trace her injury to a particular manufacturer. The latter may sue only that manufacturer rather than an entire industry. She must take the chance that the one manufacturer she can sue is amenable to suit and solvent.[122] A plaintiff in this position may be tempted to feign ignorance as to actual causation and sue the entire industry to ensure recovery. *Sindell,* therefore, ultimately rewards plaintiffs who are unable to show causation and penalizes those who can.

C. Other Courts Address the DES Issue

Two divisions of the New Jersey Superior Court recently addressed the DES issue and, relying on the same precedent, reached opposite conclusions.

In *Ferrigno v. Eli Lilly & Co.*,[123] the court's law division, relying on *Anderson v. Somberg*,[124] shifted the burden of proof of causation to the DES manufacturers.[125] In *Namm v. Charles E. Frosst & Co.*,[126] the court's appellate division, also citing *Anderson,* reached the opposite conclusion and affirmed summary judgment for the defendants.[127] As in *Sindell,* the plaintiffs in *Ferrigno* and *Namm* could not identify the DES manufacturer that caused their injuries.[128]

In *Anderson,* a case similar to *Ybara v. Spangard*,[129] the plaintiff was injured by a defective surgical instrument.[130] The plaintiff sued the

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[120] *Id.* at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court noted that the manufacturers had asserted that DES was sold for a number of uses other than the prevention of miscarriage and that it would be difficult to determine what percentage of DES was sold to prevent miscarriage. *Id.* at 613 n.29, 607 P.2d at 637-38 n.29, 163 Cal. Rptr. at 145-46 n.29.

[121] *Id.* at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

[122] *Id.* at 618, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting).

[123] 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980).

[124] 67 N.J. 291, 338 A.2d 1, *cert. denied,* 423 U.S. 929 (1975).

[125] 420 A.2d at 1312-13.

[126] 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981).

[127] 427 A.2d at 1126-27 & n.3.

[128] *Id.* at 1124, 420 A.2d at 1308.

[129] 25 Cal. 2d 486, 154 P.2d 687 (1944) (discussed at *supra* note 59).

[130] During the course of a back operation, the tip of a ronguer, a forceps-like instrument, broke off into the plaintiff's spinal canal and could not be removed. 338 A.2d at 3.

doctor, the hospital, the manufacturer of the instrument, and its distributor.[131] The trial court returned a finding of no cause as to each defendant,[132] because the plaintiff had not proved causation against any particular defendant.[133] Reversing, the New Jersey Supreme Court held that the burden of proof had shifted to the defendants,[134] because any explanation of the plaintiff's injuries would make at least one defendant liable.[135]

The *Ferrigno* court concluded that the issues addressed in *Anderson* — the plaintiff's inability to identify the causative agent and the possibility that the causative agent was not joined — were analogous to the DES fact situation.[136] It concluded that *Anderson* meant that a plaintiff's cause of action could survive failure to join a precise causative agent.[137] Therefore, the burden of proof should be shifted to the DES manufacturers even though all of them had not been joined.[138]

It is clear that the *Ferrigno* court misconstrued *Anderson.* The *Anderson* court specifically noted that all the parties that could have been responsible for negligence toward the plaintiff had been joined.[139]

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[131] The plaintiff alleged malpractice against the surgeon and negligence against the hospital for furnishing a defective instrument. He sued the distributor on a theory of warranty and the manufacturer on a theory of strict liability. *Id.*

[132] *Id.* at 4.

[133] The court relied on the doctrine of res ipsa loquitur to shift the burden of proof to the defendants. *Id.* at 6. The court also found, however, that *Summers v. Tice* supported the same conclusion. *Id.* (citing Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948)).

[134] 338 A.2d at 6. The court explained, however, that if there had been evidence of plaintiff's contributory negligence or an intervening act of nature, such proof would negate the plaintiff's prima facie case. *Id.*

[135] *Id.* The dissent argued that not all conceivable defendants had been joined in the case. *Id.* at 9-10 (Mountain, J., dissenting). The majority concluded, however, that involvement of any persons other than the defendants had "never been asserted as anything other than pure and undisguised speculation." *Id.* at 8.

[136] 420 A.2d at 1312-13.

[137] *Id.* at 1313.

[138] *Id.* The court used *Anderson* as the exclusive precedent for its holding and rejected both the *Sindell* evaluation of alternative liability, *id.* at 1314, and the theory of enterprise liability, *id.* at 1315. The court also noted that the theory of concert of action had been rejected in a previous New Jersey DES case, Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185 (App. Div. 1979). 420 A.2d at 1315. In *Lyons,* the DES plaintiff was able to identify the specific manufacturer of the DES ingested by her mother. 406 A.2d at 188. The plaintiff had also joined 11 additional DES manufacturers. *Id.* The court held that since the plaintiff could identify the manufacturer of the DES, the theories of alternative liability, enterprise liability, and concerted action were not applicable. *Id.* at 190-91.

[139] 338 A.2d at 7.

The possibility that some responsible party was not before the court was remote at best. In interpreting *Anderson*, the court in *Ferrigno* ignored the obvious fact that in a DES case, with a relatively small percentage of possible defendants joined, the responsible parties may not be before the court.[140] The *Ferrigno* court then, like the *Sindell* court, sought to compensate the DES plaintiffs by bending legal precedent to fit an unusual case.

The *Namm* court wisely declined to follow *Ferrigno's* interpretation of *Anderson*.[141] It noted that in *Anderson* there was no doubt that the party that caused the injury was before the court, whereas in the instant case such a conclusion would be merely speculative.[142] The court also rejected the theory of alternative liability, finding that theory to be a distortion of traditional tort doctrine.[143] It reasoned that such a major departure from existing law should not be undertaken by an intermediate appellate court. Finally, the court rejected the theory of enterprise liability, noting that all previous DES cases had done likewise.[144]

A New York appellate court recently addressed the DES question in *Bichler v. Eli Lilly & Co.*[145] The court based its affirmance of a $500,000 judgment for the plaintiff on the theory of concerted action,[146] even though the plaintiff had proceeded only against Eli Lilly.[147] The court recognized that in the usual case of concerted action, the plaintiff must show at least a "tacit understanding" among the defendants. The trial court, however, had instructed the jury that such a tacit understanding could be shown by the conscious parallel conduct of the defendant drug manufacturers.[148] In approving this instruction, the court declared that manufacturers should not be able to

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[140] The court noted that *Sindell* had rejected alternative liability because all the parties who could have been responsible were not joined. 420 A.2d at 1314. The court concluded, however, that the *Anderson* court had not been deterred by the possibility that all tortfeasors were not joined. *Id.* at 1314.

[141] 427 A.2d at 1127 n.3.

[142] *Id.* at 1127.

[143] *Id.* at 1128. The court noted that application of alternative liability to any or all of the 44 defendants would impose liability without fault and would result in the taking of all the defendants' property to pay for injuries caused by only one. *Id.*

[144] *Id.* at 1128-29. The court reasoned that such policy shifts are better accomplished by the supreme court or the legislature. *Id.* at 1128.

[145] 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

[146] 436 N.Y.S.2d at 628, 637.

[147] *Id.*

[148] *Id.* at 631.

escape liability through a "shroud of anonymity."[149] It concluded that the law of products liability should "adapt to the exigencies of rapidly developing technologies" and that considerations of fairness required an expansion of the doctrine of concerted action to cover the DES situation.[150] Citing two antitrust cases by way of analogy,[151] the court held that the conscious parallel behavior of Lilly was sufficient evidence from which a jury might conclude that Lilly had engaged in concerted action.[152]

The *Bichler* court erroneously focused on the activities of the drug industry from 1939 to 1941. During that period, twelve drug manufacturers formed a committee to expedite the approval of DES by the FDA.[153] In 1941, the FDA approved the use of DES for various female disorders but not for use during pregnancy;[154] however, the drug companies did not ask the FDA for permission to market DES for pregnancy problems until 1947. Although Lilly was involved in the "parallel" activity prior to 1941, there was no evidence of such activity in 1947 when DES was approved for use during pregnancy—the use that allegedly caused the plaintiff's injuries.[155] Therefore, the "parallel" activities prior to 1941 should not have been used to support any allegation of tortious conduct by Lilly. No duty of care was breached by Lilly's behavior because, as noted in *Sindell*,[156] the defendant's activity

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[149] *Id.* at 632.

[150] *Id.* (citing Hall v. E.I. DuPont De Nemours Co., 345 F. Supp. 353 (E.D.N.Y. 1972)).

[151] *Id.* (citing Theatre Enterprises v. Paramount Distrib. Corp., 346 U.S. 537 (1954), and Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939)). *Interstate Circuit* gave rise to a line of cases following a doctrine called "conscious parallelism," under which a plaintiff is able to prove that identical conduct by the defendants establishes a finding of conspiracy under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). *See, e.g.*, American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946) (conspiracy proved by concerted activity). In C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952), the court held that identical activity by the defendants did not, in and of itself, constitute conspiracy without a showing of additional factors, such as previous illegal activity by the defendants and the raising of prices in a surplus market. 197 F.2d at 497.

It has been suggested that the doctrine of "conscious parallelism" should not be applied to the DES defendant without a showing of similar additional factors indicating tortious activity. Birnbaum, *DES Concert-of-Action Theory: New Cases Bring New Confusion*, NAT'L L.J., May 4, 1981, at 31-32.

[152] 436 N.Y.S.2d at 633.

[153] *Id.* at 628.

[154] *See* Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305, 1311 (Law Div. 1980) (discussing history of FDA approval of DES).

[155] 436 N.Y.S.2d at 628.

[156] *See supra* text accompanying notes 99-102.

must be tortious as well as concerted.[157]

Like *Sindell, Bichler* raises more questions than it answers. Should the modified concert theory apply only to the drug manufacturers that comprised the 1940 committee, or should the theory also apply to the additional manufacturers who in 1947 sought approval of DES for use during pregnancy?[158] Arguably, there was less parallel activity by the DES manufacturers in 1947 than in 1941. In 1947, when DES was approved by the FDA for use to prevent miscarriage, there was no committee formed by the manufacturers; all of the new drug applications filed by the manufacturers were filed independently.[159] The *Bichler* court's response to this was that the drug companies applying for the use of DES as a miscarriage preventative had relied on the data compiled by the original committee. According to the court, this reliance provided "abundant" evidence of parallel activity from which could be inferred a tacit understanding. The court concluded that the DES manufacturers had probably omitted further testing of the drug in 1947 in order to win a market share quickly.[160] The fallacy in the court's reasoning, however, is that a "race" among competing manufacturers to seize the largest share of a market is the antithesis of a tacit or express agreement. Such activity by manufacturers could only be described as unilateral.[161]

Another DES decision that deserves mention is *Abel v. Eli Lilly & Co.*,[162] an intermediate Michigan appellate court decision reversing a summary judgment granted defendant DES manufacturers.[163] There the plaintiffs sued seventeen DES manufacturers, alleging joint and several liability based on alternative liability and concert of action.[164] The court held that the plaintiff's allegations stated a sufficient cause of action to defeat dismissal.[165] The court expressly refused to adopt the proposed theory of enterprise liability, finding instead that alternative liability and concert of action provided a sufficient rationale for its decision.[166] Significantly, the plaintiff alleged that the named defen-

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[157] *See* Birnbaum, *supra* note 151, at 32.

[158] *Id.*

[159] *See* Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305, 1311 (Law Div. 1980) (discussing history of FDA approval of DES).

[160] 436 N.Y.S.2d at 633.

[161] *See* Birnbaum, *supra* note 151, at 32 (criticizing *Bichler*).

[162] 94 Mich. App. 59, 289 N.W.2d 20 (1980), *appeal docketed,* No. 64-712 (Mich. June 3, 1981).

[163] 289 N.W.2d at 27.

[164] *Id.* at 24.

[165] *Id.* at 25.

[166] *Id.* at 27.

dants constituted all the known manufacturers of DES distributed in Michigan during the relevant period.[167] This allegation probably overcomes the primary objection to use of alternative liability in the DES cases—that all possible tortfeasors are not before the court.[168] When all possible manufacturers of the causal DES are joined, there is no chance that the party responsible for the plaintiff's injuries will escape liability.

The DES cases are difficult, if not impossible, to reconcile. Other than the California Supreme Court, the courts that have found for the DES plaintiffs have struggled to fit their claims under traditional theories of recovery because of the defendants' "deep pockets" and of "public policy." Public policy and deep pockets should not be, however, the basis for major judicial surgery upon products liability law. Though it is difficult to predict the broad effects of these cases on the law and the marketplace, the next section enumerates several probable detrimental results flowing from the courts' decisions.

IV. Probable Effects of the DES Decisions

A. General Effects

As stated above, there is a crisis in products liability insurance.[169] In the last five years, premiums have increased dramatically.[170] Some manufacturers claim that high insurance prices may force them out of business.[171] There are reportedly three causes for the current crisis: the insurance companies' rate-making procedure; manufacturing practices; and the rapid changes in the tort litigation system.[172] The DES cases not only add to current problems in insurance rate-making procedures, they represent another major change in the tort litigation system.

There is very little hard evidence to justify the rapid rise in insur-

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[167] *Id.* at 22.

[168] *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 603, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 139 (rejecting alternative liability), *cert. denied*, 449 U.S. 912 (1980).

[169] Johnson, *supra* note 2, at 678; Comment, *supra* note 9, at 1003; *see supra* notes 1-5 and accompanying text.

[170] A study by the Insurance Services Office revealed that premium increases ranged from 100% to 500% during 1976. There were no rate increases between 1963 and 1975. Consumer Product Safety Comm'n, Interagency Task Force on Product Liability, Final Report VI-12 (1977) (hereinafter cited as Final Report). The report concludes that product liability insurance was available, but the problem was affordability. *Id.* at VI-2.

[171] Johnson, *supra* note 2, at 678-79.

[172] Final Report, *supra* note 170, at I-21 to -29.

ance prices.[173] It has been suggested that the insurance companies engage in "panic pricing," that is, rather than basing a premium increase on reliable data showing an increase in claims, the insurance companies raise their prices based on notice of excessive awards in products liability actions.[174] Through "panic pricing," the insurance companies seek to anticipate an increase in claims, although such an increase may never materialize. The large awards to the plaintiffs in the DES cases and the major change in products liability law supported by those cases probably will add to the insurance industry's "panic." Rates therefore will increase even more. Those manufacturers who can—probably a majority of them—will pass their increased premiums along to the consumer, and thus add to the already high rate of inflation.

Ultimately, the DES cases may hurt rather than help women injured by the drug. While the successful plaintiffs in the recent DES cases may recover substantial awards, women injured by DES who seek recovery in the future may find their recovery to be substantially less. The recoveries allowed in the DES cases may severely diminish the ability of drug companies to pay future claims.[175] Although the majority of DES courts found that the drug industry has "deep-pockets," those pockets are not bottomless.

Additionally, future DES plaintiffs may find their recovery restricted by state legislation. Because of the excesses by the courts in the products liability area, many state legislatures have severely restricted the statutes of limitation for products actions.[176] Manufacturers are also lobbying extensively in state legislatures for further changes in products liability statutes. For example, bills have been introduced in a number of state legislatures that would make the "state of the art" an absolute defense to a products action. Under the "state of the art" defense, if a product conforms to generally recognized industry standards, the manufacturers of that product will not be liable for injury caused by that product. If this defense is adopted, industry, and not the courts, will determine its legal obligations to consumers.[177] Obviously, industry should not be allowed to set its own standard of

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[173] *Id.* at I-22.

[174] *Id.* at I-22, -24.

[175] *See generally* Comment, *supra* note 9, at 1010-11.

[176] *See supra* note 4. In response to *Sindell*, a bill to reaffirm traditional causation requirements was introduced during the 1981 session of the California legislature. 22 FOR THE DEFENSE 18, 22 (1980).

[177] For a discussion of the "state of the art" defense, see Johnson, *supra* note 2, at 680-81.

care. It is important that industry custom remain only evidence of due care and not become dispositive of the issue.[178] The DES cases merely fuel the fire that manufacturers are holding to the feet of state legislators.

The DES cases may also inhibit research into and development of new products. If individual drug manufacturers are held liable for injuries caused by new drugs without regard to proof of causation, then the incentive to produce new drugs is substantially reduced.[179] Public policy demands that the development of new drugs not be deterred in such a manner; the development of new drugs has saved many lives, and drugs yet to be developed will save many more.[180]

Finally, the DES cases may adversely affect future product safety. Manufacturers will conclude that even if they take steps to make a product safe, they will nonetheless be held liable for the defective products of other manufacturers in the same industry over whom they have no control.[181] Such liability decreases the incentive to make products safer. Damages would become another cost of doing business;[182] correspondingly, it would be less expensive to pay for consumer injuries than to remove a defect from the product.[183]

B. Effect on Courts

The DES cases will be used as precedent to support the plaintiff's cause of action in analogous factual situations. The DES cases represent only the "tip of the iceberg."[184] There are many analogous situations in which potential plaintiffs cannot recover under traditional products liability law because it is impossible for them to identify the particular manufacturers. This is most likely to occur in cases involving other drugs. Any industry, however, producing or distributing a

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[178] *Id.* at 684.

[179] *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 619-20, 607 P.2d 924, 941-42, 163 Cal. Rptr. 132, 149-50 (Richardson, J., dissenting) (inhibition of drug research), *cert. denied*, 449 U.S. 912 (1980); COMMENT, *supra* note 9, at 1004 (same).

[180] RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) implicitly recognizes the strong social policy favoring the development of new drugs by stating that the manufacturer of a useful and desirable drug should not be strictly liable for injuries caused by that drug. *Id.*

[181] Comment, *supra* note 9, at 1004.

[182] Campbell, *Enterprise Liability—An Adjustment of Priorities*, 10 FORUM 1231, 1235 (1974).

[183] *See* Comment, *supra* note 9, at 1004 n.124 (manufacturers held liable for defective products seem to be less inclined to strive for safety and quality control).

[184] See comment, *supra* note 6, at 1007.

product with identical properties may be vulnerable.[185] For instance, *Sindell* has been relied on as precedent in the ongoing litigation concerning polyvinyl chloride (PVC) insulated wiring.[186] In May of 1977, numerous deaths occurred when the Beverly Hills Supper Club in Southgate, Kentucky was destroyed by fire.[187] In the subsequent litigation, the plaintiffs alleged that the deaths were caused by toxic fumes from burning PVC wiring. Because the wiring itself was destroyed by the fire, however, the identity of its manufacturer was unknown. To overcome the causation problem, the plaintiffs alleged joint liability against the entire PVC wiring industry.[188] In an interim order, the federal district court cited *Sindell* as precedent for use of the theory of concert of action.[189]

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[185] *See generally* comment, *supra* note 9, at 1002 (cigarette smokers use many brands; chemical pollution from many plants; injury from food additives present in many food products).

[186] *In re* Beverly Hills Fire Litigation, No. 77-79 at 3 (E.D. Ky., Nov. 14, 1979) (order dismissing defendants' motion for summary judgment) (citing *Sindell*).

[187] *Id.* at 1.

[188] *Id.* at 3.

[189] *Id.* at 10. The opinion of the court in *In re Beverly Hills* included an excellent analysis of the use of concert of action in a products liability action. The court held that the plaintiff must: (1) establish that each defendant breached a legal standard of care; (2) prove that the defendants acted by express or tacit agreement to market and promote the defective product; and (3) establish a causal relationship between the defendants and the injury-causing product by (a) identifying the injury-causing product, (b) proving that each defendant marketed and promoted a generically similar product, and (c) establishing that the act of each defendant was a substantial factor in the action of the defendants to market and promote their product. *Id.* at 15. The court rejected the theories of alternative liability and enterprise liability because the State of Kentucky does not recognize either theory. *Id.* at 16.

Sindell itself may also have a limited value as precedent in the asbestosis cases. Over 8,000 cases alleging asbestos-related injuries have been filed. Wall Street J., Dec. 30, 1980, at 4, col. 4. Usually, asbestosis cases do not present the same identification problems found in DES cases because those plaintiffs can trace the manufacturer of the products to which they were exposed. It is often difficult, however, to determine with certainty which particular exposure caused a plaintiff's injury, because asbestos' effect on the lungs is cumulative. Apportionment of damages also presents a problem. These problems were identified and addressed by the United States Court of Appeals for the Fifth Circuit in Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). There, the court held that the causation requirement was satisfied if the defendants' conduct was a substantial factor in bringing about the plaintiff's injury. In response to the defendant's argument that the plaintiff should bear the loss, the court held that once causation was satisfied, the burden shifted to the defendants to show a reasonable basis for apportioning damages. If defendants were unable to do so, the court concluded, they were jointly and severally liable. *Id.* at 1094-95.

Arguably, in future asbestosis cases *Sindell*'s market share approach could be used

Sindell and its progeny, in effect, establish a form of absolute liability. Tort law in the United States, however, has always been based on the concept of fault. At the very least, there must be a connection between the defendant's act and the plaintiff's harm that proves that the defendant caused the harm.[190] If the requirement of a causal connection is removed, the court merely becomes a conduit through which the plaintiff is automatically reimbursed for injuries. Loss is arbitrarily shifted from one party to another.[191]

Parodoxically, *Sindell* and its progeny threaten not only the courts' fault-finding role, but also their administrative integrity. The courts are ill-equipped to deal with their present caseloads, let alone the new litigation spawned by *Sindell.*[192]

The DES courts stretched current legal precedent in an attempt to create a just and fair outcome. This is the way new law is made. In making new law, however, a court should balance the rights and interests of both parties to ensure fairness and justice. The elimination of proof of causation as an element of the plaintiff's prima facie case is unjust and outside the tradition of tort law. It is patently unfair to require a manufacturer to compensate someone for damages where there is only a "likelihood" of fault—to hold, for instance, five out of two hundred manufacturers liable for injuries that any of them might have caused.[193] Such a result works to make the manufacturer of a product absolutely liable for injuries caused by that product and effectively makes industry an insurer, a result strongly disapproved of in previous decisions.[194]

CONCLUSION

The courts are not the proper forum for the DES dilemma. In-

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to apportion damages among the defendants.

[190] *See* Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 645 (1978).

[191] *Id.; see, e.g.*, Simieu v. S.S. Kresge Co., 566 F.2d 551, 557, 559 (5th Cir. 1978) (proof of injury alone does not support strict liability); Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 853 (5th Cir. 1968) (mere proof of injury provides no rational basis for liability).

[192] *See* R. EPSTEIN, *supra* note 15, at 160 (discussing administrative burden of DES cases).

[193] *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 618, 607 P.2d 924, 940, 163 Cal. Rptr. 132, 148 (Richardson, J., dissenting), *cert. denied*, 449 U.S. 912 (1980).

[194] *See, e.g.*, Collins v. Ridge Tool Co., 520 F.2d 591, 594 (7th Cir. 1975) (manufacturer not insurer of product safety); Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1187 (5th Cir. 1971) (same).

stead, the DES issue, and others similar to it, are problems for the legislatures. Major changes in law, broad questions of social policy, and complex administrative problems are better met in a legislative forum than in a judicial one. Legislative alternatives to tort litigation for product-related injuries have been proposed,[195] and some have been seriously considered.[196] Both state and federal legislatures should quickly and seriously consider these and any other alternatives that would establish a fair and just system of compensating those victims of defective products who cannot utilize the traditional tort system. Perhaps the ultimate effect of the DES cases will be to stimulate such needed affirmative legislative relief.

William Bennett Carter

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[195] One method that has been suggested as an alternative is arbitration. *See* FINAL REPORT, *supra* note 170, at VII-229 to -239. Arbitration would not be a "no-fault" remedy. *Id.* at VII-229. The arbitration panel would be subject to products liability law, thereby retaining the common law concept of individual responsibility. *Id.* at VII-229 to -230. One advantage of arbitration is a lowering of the cost of litigation. *Id.* One disadvantage would be an adverse reaction to the replacement of the jury with a smaller, more expert group. *Id.* at VII-238 to -239. The study concluded that a properly constructed arbitration system has an excellent potential for creating a more predictable and less expensive judicial process. *Id.*

[196] Many articles and studies have proposed a no-fault system of products liability as an alternative to litigation. *See, e.g.*, FINAL REPORT, *supra* note 170, at VII-203 to -229 (analysis of no-fault compensation for tortious injuries); O'Connel, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501-65 (1976) (suggesting optional no-fault system for tortious injury); Schwartz, *Products Liability and No-Fault Insurance: Can One Live Without the Other?*, 12 FORUM 30-40 (1976) (suggesting no-fault system for product injuries); Comment, *supra* note 9, at 1015-22 (same).

ROBBINS AND *BELTON:* CONFLICTING SIGNALS FROM THE SUPREME COURT ON SEARCH AND SEIZURE OF CONTAINERS IN AUTOMOBILES

INTRODUCTION

Perhaps no other provision of the Bill of Rights has been the subject of as much confusing litigation as has the fourth amendment.[1] The purpose of the fourth amendment was to assure citizens that their privacy would not be invaded by unwarranted and unreasonable government intrusions.[2] To accomplish this, the amendment was made applicable not only to persons and their homes, but also to their papers and other personal effects.[3]

The American struggle for freedom from unreasonable searches that eventually gave rise to the fourth amendment actually began in England[4] in the sixteenth century. In England the government's power of search and seizure was used primarily to control publication of literature offensive to the government,[5] and led to a fight for freedom of

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[1] Searches that were held to be reasonable under the fourth amendment under earlier cases have been held to be unreasonable in later cases. *Compare, e.g.*, Olmstead v. United States, 277 U.S. 438, 465-66 (1928) (wiretapping upheld) *with* Katz v. United States, 389 U.S. 347, 353-57 (1967) (electronic "eavesdropping" into phone conversation held illegal); *see also* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 13 (1966) (fourth amendment has generated powerful controversy).

[2] Terry v. Ohio, 392 U.S. 1, 9 (1967) (Constitution forbids only unreasonable searches and seizures) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)); *see* 13 SUFF. L. REV. 1101, 1103-04 (1979) (fourth amendment protects from unreasonable searches and seizures).

[3] U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[4] Broad search and seizure power was first introduced in England by the Tudors in 1467 to control seditious and nonconformist publications. First the Crown, by use of royal prerogative, and later Parliament attempted to suppress undesirable publications by searching, seizing, and destroying books and other printed matter that the government found offensive. The power was granted by the issuance of general warrants to those charged with the responsibility of seeking out books and other publications. J. LANDYNSKI, *supra* note 1, at 19-30.

[5] *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE 3-4 (1978) (developing the history of search and seizure in England); J. LANDYNSKI, *supra* note 1, at 19-30 (same).

the press that lasted nearly three centuries.[6] In the American colonies, use of the general search warrant[7] and the writ of assistance[8] caused profound resentment. The writ of assistance was particularly resented because it was used rigorously by customs officials to enter and search buildings without authorization by a civil magistrate.[9] Against this background, the framers of the Bill of Rights[10] made the elimination of these abuses one of their primary objectives.[11] The passage of the fourth amendment[12] was intended to guarantee to private individuals upon American soil freedom from unreasonable government intrusions into their lives.[13] It has been suggested by observers of the American legal system that the objectives of those who authored the Bill of Rights would have been better served through the use of less ambiguous language, especially in the case of the fourth amendment.[14]

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[6] England began its major assault on general warrants in Parliament in 1764. The cause was aided by two famous cases that helped arouse popular feeling against such warrants. In Wilkes v. Wood, 19 Howell's State Trials 1153 (1763) and Entick v. Carrington, 19 Howell's State Trials 1029 (1765), the Court of Common Pleas held that general warrants issued by the Secretary of State commanding the arrest of editors of certain publications and the seizure of those publications were illegal. In *Entick*, the court noted that "if this point should be determined in favor of the jurisdiction, the secret cabinets . . . of every subject in this kingdom will be thrown open to the search . . . whenever the secretary of state shall think fit." *Id.* at 1063.

[7] *See generally* Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961) (use of general warrants in England described).

[8] A writ of assistance is described as being a general search warrant that could be issued by customs officials empowering them to search any property they desired to search. There were no standards governing the issuance of the writ. J. LANDYSNKI, *supra* note 1, at 31-32.

[9] *Id.* at 31.

[10] *See generally* Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part Two*, 4 U. RICH. L. REV. 60, 71-74 (1969) (discussing the adoption of the fourth amendment).

[11] *See* Lewis, Mannle & Allen, *The Burger Court and Searches Incident to a Lawful Arrest: The Current Perspective*, 7 CAP. U.L. REV. 1, 8 (1977) (misuse of warrants gave rise to fourth amendment).

[12] The Constitutional Convention, meeting in 1787, failed to include a provision dealing with searches in its first draft of the Constitution. Later, because of severe national criticism, Congress passed a Bill of Rights, which included a provision prohibiting unreasonable searches and seizures. 1 W. LAFAVE, *supra* note 5, 4-5.

[13] *See supra* notes 2, 3, and 10.

[14] The two clauses that make up the amendment are connected by the conjunction "and"; nothing in the language of the amendment as a whole indicates any relationship between the "right to be secure" clause and the "warrant" clause. It is this lack of certainty over the extent, if any, to which the warrant requirement determines or modifies what is a reasonable search that has caused division among judicial interpreters of the fourth amendment. 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS, § 1.1

After its adoption, no significant body of case law developed under the fourth amendment[15] for nearly a century.[16] *Boyd v. United States*[17] began the judicial definition of the fourth amendment[18] in 1886 with a literal interpretation of fourth amendment language[19] that prevailed throughout the early cases arising out of the amendment.[20] The Court

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(2d ed. 1980).

[15] The fourth amendment search and seizure law remained unexplored because the criminal jurisdiction of the federal government was seldom exercised until the latter part of the nineteenth century and, furthermore, the right of appeal to the Supreme Court in criminal cases was not granted until 1891. J. LANDYNSKI, *supra* note 1, at 49. *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 53 (1937) (discussing the history and development of the fourth amendment).

[16] Very few cases arose under the fourth amendment prior to 1886. However, a few significant cases were decided. *See, e.g., Ex Parte* Jackson, 96 U.S. 727, 735 (1878) (fourth amendment prohibits opening of mail by post office); Murray's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272, 285 (1855) (fourth amendment does not apply to civil proceedings); Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (the fourth amendment does not apply to the states).

[17] 116 U.S. 616 (1886).

[18] Carroll v. United States, 267 U.S. 132, 147 (1925); J. LANDYNSKI, *supra* note 1, at 49.

[19] 1 W. RINGEL, *supra* note 14, § 1.1. This literal reading is reflected in the Court's definition of a search. The Court held that a "search" had occurred when government officials had invaded an individual's "protected zone," which was roughly approximated by the borders of his personal or real property. 116 U.S. at 635, 638.

[20] The early Court's literal interpretation of the fourth amendment is illustrated by the *Boyd* case, where the Court held that personal papers were protected by the fourth amendment. 116 U.S. at 630. The early cases emphasized that it was a person's property that was protected by the fourth amendment and not his privacy. *See, e.g.,* On Lee v. United States, 343 U.S. 747, 753-54 (1952) (conversation of an individual not protected by fourth amendment); Goldman v. United States, 316 U.S. 129, 135 (1942) (same); Olmstead v. United States, 277 U.S. 438, 464 (1928) (same); Gouled v. United States, 255 U.S. 298, 303-04 (1921) (one's personal records and documents are protected by the fourth amendment). *But cf.* Schmerber v. California, 348 U.S. 757, 759 (1966) (blood samples are not protected by fourth amendment). This literal property view began to fade as the courts recognized that the fourth amendment protected one's right to privacy rather than one's property rights. *See, e.g.,* Katz v. United States, 389 U.S. 347, 350, 355 (1967) (fourth amendment protects against more than mere physical intrusion; it protects one's privacy, including one's conversations); Mapp v. Ohio, 367 U.S. 643, 650, 655 (1961) (fourth amendment protects one's right to privacy); Frank v. Maryland, 359 U.S. 360, 365 (1959) (first right protected by the fourth amendment is freedom from intrusion on privacy); Wolf v. Colorado, 338 U.S. 25, 27 (1949) (security of one's privacy is the core of the fourth amendment). As the judicial definition of the fourth amendment continued to develop, the Court also moved away from *Boyd* by allowing a court to admit personal papers into evidence after the court had compelled their production. *See* Andresen v. Maryland, 427 U.S. 463, 480-81 (1976) (search warrant for documents does not involve compulsion since subject of warrant is required to do nothing); Fisher v. United States,

in *Boyd* found the search in question, which was carried out pursuant to United States customs law,[21] to be unreasonable, stating that the power to command compulsory production of documents was tantamount to requiring self-incrimination.[22] Discussing the fourth amendment's applicability to the case, the Court adhered strictly to property law concepts,[23] finding an individual's fourth amendment rights to be violated only when the borders of his personal property were invaded.[24] This adherence to property concepts would fade with time,[25] but the exclusionary rule,[26] which was latent in *Boyd,* has emerged;[27] moreover, it has been modified,[28] has withstood harsh criticism,[29] and appears to

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425 U.S. 391, 409 (1976) (compelled production of personal documents does not violate fourth amendment since the courts are interested only in the existence of the papers).

[21] 116 U.S. at 617-21.

[22] *Id.* at 634-35. The Court was of the opinion that compulsory production of personal property such as books and papers, in essence, forced a person to be a witness against himself within the meaning of the fifth amendment. This reasoning in *Boyd* was later held to be erroneous in regard to the subject matter of most search and seizures. *See* Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29 MICH. L. REV. 1, 19 (1930) (holding is bad law today and is least defensible feature of the decision).

[23] 116 U.S. at 628-30; 1 W. RINGEL, *supra* note 14, § 1.2.

[24] 116 U.S. at 628-30; 1 W. RINGEL, *supra* note 14, § 1.1.

[25] In Katz v. United States, 389 U.S. 347 (1967), the Court refused to adopt the view that physical penetration is required before a search and seizure can be said to have violated the fourth amendment. The Court instead held that the amendment protects one's general right to privacy. *Id.* at 350.

[26] The rule implicit in *Boyd* is that evidence secured by means of an unconstitutional search is inadmissible as evidence in federal courts. 116 U.S. at 634. The exclusionary rule is the primary mode of enforcement of the warrant requirement. It has been described as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974).

[27] Weeks v. United States, 232 U.S. 383, 394-98 (1914).

[28] *See* Mapp v. Ohio, 367 U.S. 643, 650-60 (1961) (applying exclusionary rule to state courts) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).

[29] There has been some disagreement with the rule and many have called for its further modification or abolition. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 469 (1976) (Burger, C.J., concurring) (arguing that the time has come to limit the exclusionary rule's reach to a select class of cases); *id.* at 537-42 (White, J., dissenting) (arguing that the reach of the rule should be substantially limited); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting) (stating that a better way of enforcing the fourth amendment should be found; Court should not cling to an unworkable and irrational concept); Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) (arguing that the entire law of search and seizure is due an overhaul). *See generally* Note, *The Decline of the Exclusionary Rule: An Alternative to Injustice,* 4 SW. U.L. REV. 68 (1972).

be here to stay.[30]

The judicial standard of review applied by the Supreme Court until 1967 was not whether it was reasonable to procure a search warrant, but instead whether the search itself was reasonable.[31] This general reasonableness standard seems, however, to have been abandoned by the Court in favor of a rule that would hold any warrantless search unreasonable per se.[32] This new standard has placed a severe burden on government officials, since, in order to avoid the exclusionary rule, they must show that a warrantless search falls within one of the "jealously and carefully drawn"[33] exceptions to the fourth amendment warrant requirement.[34]

Of the recognized exceptions to the warrant requirement, none has had a more pervasive effect upon the law of criminal procedure or caused more confusion than the automobile exception[35] and the search incident to arrest exception.[36] The trepidation with which many regard

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[30] *But see* United States v. Williams, 622 F.2d 830, 840-46 (5th Cir. 1980) ("good faith" exception to exclusionary rule), *cert. denied*, 449 U.S. 1127 (1981).

[31] *See* Cooper v. California, 386 U.S. 58, 62 (1967) (the relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable); Lewis v. United States, 385 U.S. 206, 212 (1966) (reasonableness of search dependent upon the facts of each case); Harris v. United States, 331 U.S. 145, 156 (1947) (same); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) (same).

[32] *See* United States v. United States District Court, 407 U.S. 297, 315 (1972) (expressly rejecting the reasonableness-of-the-search test); Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971) (warrantless search is per se unreasonable unless it falls within recognized exception); Chimel v. California, 395 U.S. 752, 765 (1969) (if no exceptions to warrant requirement exist, warrant is necessary); Katz v. United States, 389 U.S. 347, 356 (1967) (holding that prior approval of magistrate is required or search conducted will be unreasonable per se). Most lower courts did not like the new standard of review and avoided its application by holding that certain fact situations did not involve a search under the fourth amendment. *See, e.g.*, United States v. Edwards, 498 F.2d 496, 498 (2d Cir. 1974) (airport search not a search under the fourth amendment); United States v. Moreno, 475 F.2d 44, 51 (5th Cir. 1972) (same); *In re* G., 90 Cal. 361, 363 (Cal. App. 1970) (student search not within the fourth amendment); Commonwealth v. Dingfelt, 323 A.2d 145, 147 (Pa. Super. Ct. 1974) (same); Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970) (same).

[33] Jones v. United States, 357 U.S. 493, 499 (1958).

[34] Some exceptions to the warrant requirement are: (1) automobile exception, Carroll v. United States, 267 U.S. 132 (1925); (2) search incident to custodial arrest, Chimel v. California, 395 U.S. 752 (1969); (3) hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); (4) plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971); (5) consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and (6) exigent circumstances, McDonald v. United States, 335 U.S. 451 (1948).

[35] *See* 11 SETON HALL L. REV. 121, 124 (1980) (developing history of automobile exception); *infra* note 40 and accompanying text.

[36] Justice White, in his dissent in the landmark case *Chimel v. California*, stated:

the body of law surrounding these two exceptions is compounded by the fact that in situations involving searches of automobiles the two are often erroneously treated as being interchangeable.[37] In deciding two recent cases, the United States Supreme Court had occasion to further construe the automobile exception and the search incident to arrest exception. Since the two cases, *Robbins v. California*[38] and *New York v. Belton*,[39] contained surprisingly similar factual situations, the Court had the opportunity to clear up some of the confusion that had grown around the two exceptions. The purpose of this Comment is to chronicle briefly the development of both the automobile exception and the search incident to arrest exception, discuss the holdings and rationale of *Robbins* and *Belton*, point out possible inconsistencies in these decisions, and analyze their possible effect on search and seizure law.

I. The Automobile Exception

A. *The Development of the Exception: The* Carroll *Doctrine*

The automobile exception to the fourth amendment warrant requirement allows a lawful, warrantless search of an automobile that law enforcement officials have probable cause to believe contains contraband or other evidence of criminal activity.[40] The confusion surrounding this exception developed as a result of conflicting decisions by the Supreme Court regarding the authority of government officials, in varying circumstances, to make warrantless searches of

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"Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the 'search incident to arrest.' There has been a remarkable instability in this whole area . . . ." Chimel v. California, 395 U.S. 752, 770 (1969).

[37] It has been stated that courts frequently commingle and confuse the search incident to arrest and automobile exceptions. Justice Powell found the area to be "intolerably confusing." Robbins v. California, 101 S. Ct. 2841, 2848 (1981).

This is probably due, at least in part, to the fact that the automobile exception is not limited to automobiles. C. Whitebread, Criminal Procedure § 7.1 (1980). Another confusing factor is the use of the search incident to arrest exception to justify searches of automobiles. *E.g.*, United States v. Dixon, 558 F.2d 919, 922 (9th Cir. 1977) (paper bag containing contraband found on floorboard of automobile), *cert. denied*, 434 U.S. 1069 (1978); United States v. Farrar, 470 F. Supp. 128, 131 (S.D. Miss. 1979) (purse found under front seat of automobile). *See generally* 2 W. LaFave, *supra* note 5, § 7.1, at 500 (1978) (cases under automobile and search incident to arrest exceptions difficult to harmonize).

[38] 101 S. Ct. 2841 (1981).

[39] 101 S. Ct. 2860 (1981).

[40] Colorado v. Bannister, 449 U.S. 1, 3 (1980); Arkansas v. Sanders, 442 U.S. 753, 760 (1979).

automobiles.[41] In *Carroll v. United States*,[42] the Supreme Court first held that a warrantless search of an automobile was lawful so long as law enforcement officers had probable cause to believe that evidence of a crime was contained therein.[43] The *Carroll* Court reasoned that probable cause,[44] coupled with the exigency of the automobile's mobility,[45] justified a warrantless search since it would be impractical to require

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[41] *Compare* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (warrantless search upheld even though police had probable cause to obtain warrant well before defendant's arrest) *with* Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971) (warrantless search within automobile exception only if police have no chance to obtain warrant and probable cause for search arises immediately). *See also* Chambers v. Maroney, 399 U.S. 42, 52 (1970) (warrantless search upheld even though search conducted long after police had control of car); Carroll v. United States, 267 U.S. 132, 161 (1925) (warrantless search within automobile exception only if exigent circumstances exist). The lower courts have done no better in trying to reconcile the Supreme Court's decisions. *Compare* United States v. Menkle, 468 F.2d 20, 23 (3d Cir. 1972) (exigency found where search planned in advance) *with* Lewis v. Cardwell, 476 F.2d 467, 470 (6th Cir. 1973) (no exigency in planned search), *rev'd*, 417 U.S. 583 (1974).

[42] 267 U.S. 132 (1925).

[43] *Id.* at 149. In *Carroll*, two prohibition agents conducted a warrantless search of two known "bootleggers" and found 68 bottles of whiskey concealed in the seat of their automobile. *Id.* at 135-36. The defendants argued that the warrantless search of their car was unconstitutional since it was not justified as incident to a lawful arrest. *Id.* at 156-58. The Court held, however, that the search was valid and that the constitutionality of the search and seizure was not dependent upon the validity of the arrest. *Id.* at 158.

[44] The *Carroll* opinion both collected and articulated definitions of probable cause. *See id.* at 155-56. It quoted an earlier opinion, Stacy v. Emery, 97 U.S. 642 (1878), which held that probable cause has been established "[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Id.* at 645. The *Carroll* Court went on to hold that the probable cause requirement had been met whenever "the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." 267 U.S. at 162. The probable cause requirement of the *Carroll* doctrine is the most important requirement of the three, and even real exigencies will not, standing alone, justify an automobile exception without probable cause. *See* United States v. Ortiz, 422 U.S. 891, 896 (1975) (probable cause is minimum requirement for lawful search); Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973) (same); *cf.* United States v. Brennan, 538 F.2d 711, 718 (5th Cir. 1976) (search of airplane for marijuana requires probable cause), *cert. denied*, 429 U.S. 1092 (1977). *See generally* Comment, *United States v. Bailey: Probable Cause and Reasonableness Test Under the Fourth Amendment—A Distinction Without a Difference?*, 45 TEMP. L.Q. 610, 615 (1972) (discussing and defining probable cause as it applies to fourth amendment search and seizure).

[45] For the purpose of applying the *Carroll* doctrine, exigent circumstances that make it impractical to secure a search warrant prior to the search must exist. C. WHITEBREAD, *supra* note 37, § 7.06 (1980).

law enforcement officers to procure a warrant while the automobile disappeared from sight.[46] After *Carroll,* there was little resort to the doctrine[47] until it began to be more fully developed in *Chambers v. Maroney,*[48] a case involving a search that occurred after the car had been taken to the police station.[49] The *Chambers* Court held that where officers had probable cause to search the automobile at the time it was stopped,[50] probable cause continued to exist until the first opportunity arose to conduct the search.[51] This was held to be true even though the attribute of mobility, which lies at the very heart of the *Carroll* doctrine, was no longer present. The *Carroll* doctrine's exigency element was expanded by *Chambers'* holding that it was not the immediate mobility but the inherent mobility of an automobile that qualified it for the automobile exception. The rationale for this position is that if the right to make a warrantless search under the automobile exception

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[46] For several decades following the decision, there were only a few decisions applying the *Carroll* doctrine. These cases did very little to define or alter its dimensions. *See, e.g.,* Brinegar v. United States, 338 U.S. 160, 164 (1949) (applying the doctrine to a situation involving a fleeing automobile); Scher v. United States, 305 U.S. 251, 254 (1938) (same); Husty v. United States, 282 U.S. 694, 700 (1931) (same); United States v. Lee, 274 U.S. 559, 563 (1927) (applying the *Carroll* doctrine to a search of a motorboat carrying illegal liquors).

[47] Most cases involving searches of automobiles could be disposed of by utilizing the more fully articulated law under the search incident to arrest exception. The Court, however, severely restricted the use of this exception in Chimel v. California, 395 U.S. 752 (1969), by holding that the scope of a search incident to a lawful arrest extends only to that area within the arrestee's reach or control. *Id.* at 763. Because of the limitations placed on this exception, the automobile exception became a much more important means of justifying a warrantless search of an automobile. *See* Moylan, *The Automobile Exception: What It Is and What It is Not—A Rationale in Search of a Clearer Label,* 27 MERCER L. REV. 987, 1015 (1976) (discussing the overlapping of the automobile exception with the search incident to arrest doctrine).

[48] 399 U.S. 42 (1970).

[49] In *Chambers* the defendants' car was stopped and the defendants arrested shortly after they had been identified as participants in the robbery of a local service station. *Id.* at 44. The defendants' car was driven to the police station where a warrantless search revealed evidence subsequently used against the defendants. *Id.* at 44-45.

[50] The police, having received a detailed description of the automobile and the suspects from the victim and from teenagers who had noticed the car, had probable cause to believe the car might contain evidence of the crime. *Id.* at 47-48.

[51] *Id.* at 52. The Court clearly pointed out that sometimes a curb-side search is neither convenient nor safe: "It is not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in the dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers . . . ." *Id.* at 52 n.10.

Since the automobile could have been lawfully searched when it was stopped, there was no reason to prevent a subsequent search at the station house. *Id.*

vests at the time of an arrest, it will not be lost simply because the police choose to wait and execute that search a short time later.[52] The Court also announced that there is no constitutional difference between a search and a seizure, and, if a warrantless seizure is permitted after the arrest, a warrantless search is permitted at the station house.[53]

In *Coolidge v. New Hampshire*,[54] the Court provided a clear exposition of *Chambers*, including its effect on *Carroll*. The plurality in *Coolidge* invalidated a warrantless[55] search of a parked car that police had had probable cause to search for several weeks.[56] The State based its argument on *Chambers*, claiming that the inherent mobility of the automobile at the time of the search made the search valid and constitutional. The Court, however, made clear that simply by towing a car to the police station one does not create exigent circumstances sufficient to apply the automobile exception as defined in *Carroll* and

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[52] Moylan, *supra* note 47, at 1004.

[53] 399 U.S. at 51-52. The seizure of the vehicle by police violates an individual's interest in maintaining control over his property, while the search violates his interest in maintaining the secrecy of the car's contents. *Id.* The Supreme Court refused to hold that one of these interests was more worthy of fourth amendment protection than the other. Justice White argued for the seven member majority that, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is issued. *Id.* at 51. Under this analysis, only the "lesser" fourth amendment violation of immobilization would be allowed until a magistrate authorized the "greater" intrusion into the subject's privacy. It was ultimately decided, however, that the question of which is the "greater" or "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *Id.* at 51-52.

Justice Harlan argued that, in the vast majority of cases, a search is definitely a greater intrusion than a mere seizure of the automobile, since the search creates the greater potential for putting the subject behind bars. The lesser intrusion of seizure will provide the opportunity for the magistrate to pass upon the justification for the search. Furthermore, since the facts establishing probable cause for the search will often justify arrest or detention of the occupants of the vehicle, those occupants will suffer minimal further inconvenience from the temporary immobilization of their vehicle. *Id.* at 63 (Harlan, J., concurring in part, dissenting in part). Justice Harlan also noted that those persons with nothing to hide, who would be more offended by temporary immobilization of their vehicle, may always consent to the "lesser" intrusion. *Id.*

[54] 403 U.S. 443 (1971).

[55] A search warrant was issued by the Attorney General of New Hampshire. However, because the Attorney General was held not to be a neutral and detached magistrate, the warrant was defective and void. *Id.* at 449-53.

[56] After several weeks of investigation, the defendant was arrested for the murder of a child. His car was towed from his private residence to the police station and searched for evidence relating to the murder. *Id.* at 447. The police had been watching the defendant's house and automobile for several weeks and had probable cause to arrest the defendant and search his car several days before he was actually arrested. *Id.*

Chambers.[57] *Chambers* stands only for the principle that if, based on *Carroll*'s requirements of probable cause and exigent circumstances, the right to make a warrantless search accrues, that right remains even though the search is delayed a short time.[58] Because the police had probable cause to search the car long before the search was made, *Chambers* was inapplicable. If the police have a reasonable and practical opportunity to obtain a warrant before the search, as they did in *Coolidge*, then *Carroll* and *Chambers* dictate that the necessary exigent circumstances for a warrantless search do not exist.[59]

B. The Scope of the Automobile Exception

As the Court continued its struggle to define the *Carroll* doctrine and the fourth amendment,[60] the issue of the scope of the automobile

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[57] The Court stated that the facts in *Coolidge* did not resemble those in *Carroll* or *Chambers*. The former was distinguishable because during the investigation the police were aware of the defendant's probable connection with the crime and there was no indication that the defendant was going to flee. Moreover, the defendant had been extremely cooperative with the police and had not taken advantage of opportunities to destroy the evidence. *Id.* at 460.

[58] Moylan, *supra* note 47, at 1008.

[59] *Id.* at 1004-08.

[60] *See, e.g.*, Texas v. White, 423 U.S. 67, 68 (1975) (per curiam) (upheld search of automobile after it had been taken to police station); Almeida-Sanchez v.United States, 413 U.S. 266, 269 (1973) (overruled border search of car stopped at border without probable cause).

In Cardwell v. Lewis, 417 U.S. 583 (1974), the Court began to expand the exigency requirement of the *Carroll* doctrine. The *Cardwell* Court upheld a warrantless search of the exterior of an automobile belonging to a murder suspect. It was questionable whether the impounded car met the *Chambers* requirement of mobility, but the Court found mobility not to be an essential requirement. The Court said that a person has a lower expectation of privacy in an automobile because it does not serve as a storage place for personal effects. *Id.* at 583-91. Since the fourth amendment protects against invasions of privacy, rather than protecting property interests, the lowered expectation of privacy in an automobile calls for less fourth amendment protection. *Id.* at 583, 591. In short, the Court applied a probable cause plus lesser expectation of privacy test rather than the probable cause plus exigent circumstances test. Other cases have also reflected this changing standard. *See, e.g.*, United States v. Newbourn, 600 F.2d 452, 458 (4th Cir. 1979) (recognizing expectation of privacy test for cars); Haefeli v. Chernoff, 526 F.2d 1314, 1317-19 (1st Cir. 1975) (mobility requirement is no longer necessary for search where there is a reduced expectation of privacy).

While *Cardwell* did not apply the privacy standard to closed areas of the car, many courts interpreted the decision to apply to the entire car. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 148 (1978) (passenger has no expectation of privacy in glove compartment or under seats); United States v. Carr, 584 F.2d 612, 619 (2d Cir. 1978) (warrantless search of trunk resulting in the discovery of guns upheld), *cert. denied*, 440 U.S. 935 (1979); United States v. Edwards, 577 F.2d 883, 893 (5th Cir. 1978) (warrantless search and

exception began to emerge.[61] A primary question was whether the automobile exception encompassed luggage and other personal effects in the immediate possession of an individual or in his automobile at the time he is stopped. If included in the exception, these items could be searched without a warrant if there was probable cause to believe they contained contraband.[62]

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seizure of items under the carpet of the car).

Many courts simply ignored *Cardwell*'s "expectation of privacy" rule and continued to look for exigent circumstances. *See, e.g.,* United States v. Orozco, 590 F.2d 789, 793 (9th Cir. 1979) (warrantless search justified only upon showing of exigent circumstances); United States v. Moreno, 569 F.2d 1040, 1052 (9th Cir.) (search upheld under application of the "moving vehicle exception"), *cert. denied,* 435 U.S. 972 (1978); United States v. Woods, 563 F.2d 509, 514 (6th Cir.) (exigent circumstances found in motel parking lot), *cert. denied,* 535 U.S. 972 (1978); United States v. Peterson, 549 F.2d 654, 660 (9th Cir. 1977) (threat of destruction of evidence is exigent circumstance); United States v. Kelly, 547 F.2d 82, 84 (8th Cir.1977) (exigent circumstances test applied to parked car); United States v. Pheaster, 544 F.2d 353, 374 (9th Cir. 1976) (threat of destruction of evidence exigent circumstance), *cert. denied,* 429 U.S. 1099 (1977). Some courts adopted a combination of both tests. *See, e.g.,* United States v. Alden, 576 F.2d 772, 775 (8th Cir.) (automobile exception exists partly because of automobile's mobility and partly because of the reduced expectations of privacy surrounding automobiles), *cert. denied,* 439 U.S. 855 (1978).

[61] *See generally* Comment, *Constitutional Law - Search and Seizure - Warrantless Searches,* 24 NEW YORK L. SCH. REV. 481, 487 (1978) (discussing development of automobile exception); 2 W. LAFAVE, *supra* note 5, at 498-605 (same).

[62] Prior to the United States Supreme Court decisions dealing with this question, most courts of appeals had held that closed containers found in a lawful warrantless search of an automobile were covered by the exception and could be opened and searched. *See, e.g.,* United States v. Simmons, 567 F.2d 314, 319 (7th Cir. 1977) (per curiam) (full search of all that a person has in his possession is justified); United States v. French, 545 F.2d 1021, 1022 (5th Cir. 1977) (per curiam) (search of all within view is justified); United States v. Vento, 533 F.2d 838, 867 n.101 (3d Cir. 1976) (upheld search of closed paper bag found in defendant's automobile during a lawful warrantless search of his automobile); United States v. Tramunti, 513 F.2d 1087, 1104 (2d Cir.) (warrantless search of suitcase found in car during search upheld), *cert. denied,* 423 U.S. 832 (1975); United States v. Buckhanon, 505 F.2d 1079, 1082 (8th Cir. 1974) (warrantless search of suitcase found in car justified if probable cause is present); United States v. Anderson, 500 F.2d 1311,1315 (5th Cir. 1974) (search of container in car upheld); United States v. Soriano, 497 F.2d 147, 149 (5th Cir. 1974) (where probable cause exists to search a car, it exists to search all contained in the car); United States v. Frick, 490 F.2d 666, 669 (5th Cir. 1973) (the right to search an automobile extends to everything in the car), *cert. denied,* 419 U.S. 831 (1974); United States v. Evans, 481 F.2d 990, 994 (9th Cir. 1973) (search of suitcase upheld because it is as mobile as automobile); United States v. Johnson, 467 F.2d 630, 639 (2d Cir. 1972) (upheld search of containers in trunk), *cert. denied,* 413 U.S. 920 (1973); United States v. Mehciz, 437 F.2d 145, 146 (9th Cir.) (same), *cert. denied,* 402 U.S. 974 (1971). *But cf.* United States v. Rothman, 492 F.2d 1260, 1266 (4th Cir. 1973) (search of luggage in airport without obtaining warrant violates fourth amendment); United States v. Colbert, 454 F.2d 801, 804 (5th Cir. 1972) (warrantless search of

The Supreme Court first confronted this question in *United States v. Chadwick*.[63] In *Chadwick*, the Government sought to persuade the Supreme Court to sanction the warrantless search of luggage found in a lawfully searched automobile.[64] The Government argued that luggage, when it is found in the car, is analogous to a motor vehicle. Therefore, the same rationale that permits warrantless searches of automobiles, mobility plus probable cause, should apply to luggage.[65] The seven member majority rejected this argument, holding that a person has a higher expectation of privacy[66] in luggage than in an automobile[67] and, therefore, luggage is afforded a higher degree of fourth amendment protection.[68] The Court noted that the mobility of luggage, once in the hands of the police, was negligible or nonexistent.[69] Thus, after the luggage was seized and no longer mobile, it was unreasonable to undertake the greater intrusion of search without a warrant.[70] While it appeared clear that under *Chadwick* the proper procedure with regard to luggage was to seize and secure it until a search warrant was received,[71] *Chadwick* by no means resolved the issue.[72] The Court

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briefcase in patrol car violates fourth amendment), *rev'd on other grounds*, 474 F.2d 174 (5th Cir. 1973) (en banc). *See generally* Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 IOWA L. REV. 1134, 1156-60 (1973) (discussing suspect nature of mobility exception as applied to automobiles but not other items).

[63] 433 U.S. 1 (1977).

[64] In *Chadwick*, federal narcotics agents were waiting for Chadwick at a train station in Boston after learning from railroad officials that he was carrying large amounts of marijuana in a footlocker. *Id.* at 3-4. The defendant claimed the footlocker at the baggage section of the station and placed it in his car. Before the car could be started or the trunk closed, the agents moved in and arrested Chadwick and two other suspects. *Id.* After arresting the defendant, the police towed the car to the police station and conducted a warrantless search of the footlocker. *Id.*

[65] *Id.* at 11-14.

[66] *Id.* at 7, 11. Chief Justice Burger, writing for the majority, argued that the interest of the framers of the Constitution was to protect people rather than places and that the primary purpose of the amendment is to safeguard an individual's "legitimate right to privacy." *Id.* at 7. The Chief Justice reasoned that by placing his effects in a double locked trunk, Chadwick had manifested an intent to keep the contents private and away from public view. *Id.* at 11. Thus, before a law enforcement officer can invade a person's legitimate expectation of privacy, the Constitution demands that he first obtain a search warrant from a detached magistrate. *Id.*

[67] *Id.* at 13. "Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects." *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See id.* at 13 n.8.

[72] *Compare* United States v. Stevie, 582 F.2d 1175, 1178-79 (8th Cir. 1978) (an indi-

faced the issue again in *Arkansas v. Sanders*[73] and attempted to clear the confusion. The State argued in *Sanders* that where police remove luggage from a lawfully stopped car,[74] *Chadwick* was not applicable since *Chadwick* had involved the removal and search of luggage from a parked car.[75] In addition, citing *Chambers*, the State argued that where the seizure of a suitcase was permissible under the fourth amendment, an immediate search of the suitcase would also be constitutional.[76] The Court found, however, that neither the reduced expectation of privacy surrounding the automobile nor the mobility test of the automobile exception could be applied to the luggage seized in *Sanders*.[77] The very purpose of luggage, the Court stated, is to keep one's personal effects private. One's interest in maintaining the privacy of those personal effects may not be violated simply because he places the luggage in his automobile. Thus, where police have lawfully detained an individual suspected of a crime and secured his suitcase, they should delay the search of the suitcase until a warrant is obtained, since there is neither a risk of loss of the evidence nor danger to the officer.[78] While holding that a closed suitcase was protected by the fourth amendment, the *Sanders* Court recognized that special circumstances may justify a warrantless search of packages. The Court stated that "some containers . . . by their very nature cannot support any reasonable expecta-

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vidual's expectation of privacy in the contents of closed luggage is protected by the fourth amendment), *cert. denied*, 443 U.S. 911 (1979) *with* United States v. Ochs, 595 F.2d 1247, 1255 (2d Cir. 1979) (warrantless search of car at police station may include containers that police have probable cause to believe may contain evidence of a crime) *and* United States v. Gaultney, 581 F.2d 1137, 1144 (5th Cir. 1978) (box found in defendant's truck may be searched if probable cause exists) *and* United States v. Finnegan, 568 F.2d 637, 641 (9th Cir. 1977) (holding valid warrantless search of luggage removed from appellant's car).

[73] 442 U.S. 753 (1979).

[74] In *Sanders*, police were informed that the defendant would arrive at the Little Rock, Arkansas, airport carrying a green suitcase containing a large amount of marijuana. *Id.* at 755. The airport was placed under surveillance and, as predicted, Sanders appeared carrying a green suitcase. *Id.* After placing the suitcase in the trunk of a taxi, he and a companion got in the taxi and drove off. Several blocks from the airport the officers stopped the taxi and conducted a warrantless search of the car. The police seized the green suitcase, opened it without the consent of Sanders, and found nine pounds of marijuana. *Id.*

[75] *Id.* at 762. The Court, however, stated that luggage taken from a car stopped on a highway is attended by no less expectation of privacy than luggage taken from any other location. *Id.* at 764.

[76] *Id.* at 765 n.14; *see supra* note 47.

[77] 442 U.S. at 763-64.

[78] *Id.* at 765 n.14.

tion of privacy because their contents can be inferred from their outward appearance."[79] The Court recognized that it may be difficult to determine when the search of parcels taken from an automobile requires a warrant. It emphasized, however, that a warrant is generally required before personal luggage can be searched, and the extent to which the fourth amendment applies to other containers is not dependent upon whether they are seized from an automobile.[80]

C. *Robbins v. California*

The Court continued its attempt to define the scope of the automobile exception in *Robbins v. California*.[81] There, the Court reversed the petitioner's conviction for various drug offenses, accepting his contention that evidence discovered during the warrantless search of his automobile prior to his arrest should have been excluded from trial, since the warrantless search violated his fourth amendment rights. The evidence consisted of thirty pounds of marijuana found wrapped in green, opaque plastic in the petitioner's trunk, seized after the petitioner had been stopped for driving erratically.[82] The State argued that the search of the automobile and the opening of the closed containers fell squarely within the automobile exception since the containers were found in an automobile that the officer had probable cause to search.[83]

The Court held, however, that a closed container found during a lawful search of one's automobile may not be opened without a warrant under the automobile exception.[84] The plurality noted that the containers found in Robbins' automobile were found during a lawful

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[79] *Id.* at 764 n.13.

[80] *Id.*

[81] 101 S. Ct. 2841. Justice Stewart wrote a plurality opinion in which Justices Brennan, White, and Marshall joined. Chief Justice Burger and Justice Powell concurred in the judgment. Justices Blackmun, Rehnquist, and Stevens wrote separate dissents.

[82] *Id.* at 2844. The officers inspected the automobile and the packages in search of contraband after smelling marijuana smoke in the car. The two packages containing the contraband were unwrapped without Robbins' permission. *Id.*

[83] *Id.* at 2845. The Court rejected the State's argument that luggage or other containers found in an automobile lawfully searched under the automobile exception should also fall within the automobile exception. *Id.* As it did in *Chadwick* and *Arkansas v. Sanders*, the Court stated that luggage or containers taken from an automobile deserve the same fourth amendment protection as luggage taken from any other place. *Id.* at 2846. The Court also rejected the State's argument that the containers fell within the *Sanders* exception that would allow a warrantless search of packages that clearly announce their contents by the configuration of the container. *Id.; see supra* note 79 and accompanying text.

[84] 101 S. Ct. at 2847.

search of the car, but held that the contents of the closed containers were protected by the fourth amendment from a warrantless search.[85] The Court noted that had the State alleged that the opening of the packages was incident to a lawful custodial arrest, the search might have been justified.[86]

II. The Search Incident to Arrest Exception

A. *The Development of the Exception*

The search incident to arrest exception[87] was nominally articulated by the Supreme Court in *Weeks v. United States*.[88] Although the *Weeks* case involved a search prior to arrest,[89] the Court stated in dicta that the search incident to arrest exception had always been recognized under English and American law.[90] Originally, the exception was limited to a search, for evidence of the crime, of the person of one who had been legally arrested.[91] Later cases were to expand both the scope and the rationale of the exception.[92]

In *Carroll v. United States*[93] the Court, in the course of promulgating the automobile exception, also expanded the general power of

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[85] *Id.*

[86] *Id.* at 2847 n.3. Justice Stevens stated that Robbins had been arrested when the second search occurred. *Id.* at 2855. In fact, there is some confusion as to whether Robbins had been arrested at that time. It is the opinion of Robbins' attorney, based solely on the testimony of the arresting officer, that Robbins was under arrest at the time of the search. Telephone conversation between John M. Loper, *Mississippi Law Journal*, and Joseph G. Baxter (January 14, 1982). The office of the Attorney General of California also believes that Robbins was under arrest at the time of the search; although he had not at that time been read his *Miranda* rights, he was restrained and "effectively under arrest." Telephone conversation between John M. Loper, *Mississippi Law Journal*, and Ronald E. Niver, office of the Attorney General, State of California (January 14, 1982). If Robbins was in fact arrested prior to the search, then the *Robbins* and *Belton* fact situations are virtually indistinguishable. *See infra* text accompanying note 157.

[87] The exception basically has stood for the proposition that the arresting officer may make a search, following a legal arrest, to locate evidence that might easily be destroyed or weapons that might be used against the officer. Agnello v. United States, 269 U.S. 20, 30 (1925).

[88] 232 U.S. 383 (1914).

[89] *Id.* at 386.

[90] *Id.* at 392. One commentator has stated that *Weeks* was the first real American search incident to arrest case. J. Landynski, *supra* note 1, at 87. A closer look at the case reveals that, although the Court mentioned the exception in passing, it was not directly relevant to the Court's decision.

[91] 232 U.S. at 392.

[92] *See infra* notes 96-141 and accompanying text.

[93] 267 U.S. 132 (1925).

search and seizure available to government officials in their attempts to procure incriminating evidence. The Court stated that when a person is lawfully arrested the arresting officer does not violate the arrestee's fourth amendment rights by searching the arrestee and those things within his control.[94] This broadening of the permissible scope of search incident to arrest gave rise to a series of cases in which the Supreme Court made at least four measurable changes in the level of judicial tolerance shown such searches.[95] In *Agnello v. United States*,[96] the first true search incident to arrest case,[97] the Court held that a subsequent search of the arrestee's home, which was located several blocks from the site of the arrest, could not be justified as "incident" to the arrest, and was therefore unconstitutional.[98] This constriction of the area in which a search incident to arrest is justified was followed by a perplexing series of cases that alternately expanded and limited the permissible scope of search incident to lawful arrest.[99]

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[94] *Id.* at 158.

[95] Chimel v. California, 395 U.S. 752, 770 (1969) (White, J., dissenting).

[96] 269 U.S. 20 (1925).

[97] Since neither *Weeks* nor *Carroll* were search incident to arrest cases, *see supra* notes 89-90 & 93-94 and accompanying text, *Agnello* was the first direct pronouncement on the exception.

[98] 269 U.S. at 35.

[99] The first noteworthy case to follow *Agnello* came just two years later. In Marron v. United States, 275 U.S. 192 (1927), the Court again dealt with the "area under arrestee's control" facet of the *Carroll* decision. *Marron*, however, did involve the use of a search warrant. Prohibition agents obtained a warrant to search the petitioner's place of business for intoxicating liquors. *Id.* at 193. In the execution of the search, the agents also confiscated ledgers and bills found on the premises. *Id.* at 194. Although the petitioner insisted that the ledgers and the bills were not described in the search warrant and that their seizure therefore violated his fourth amendment rights, *id.*, the Court ruled that the agents had a right to search, contemporaneously and without a warrant, the entire establishment and to seize the things used to carry on a criminal enterprise as a search incident to a lawful arrest. *Id.* at 198-99. The Court held that the ledgers, which were found in a closet, and the bills, which were found in the cash register, were in Marron's "immediate possession and control." *Id.* at 199.

This broad definition of area of control was followed by two decisions in which the Court found unlawful searches very similar to the search upheld in *Marron*. In Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), the search and seizure also resulted in the confiscation of ledgers and business records as well as liquor. *Id.* at 351. The Court found that since the seizure was carried out under color of warrant, there had been ample time to obtain a warrant, and the agents had searched filing cabinets and a safe, the search was unlawful. *Id.* at 358. United States v. Lefkowitz, 285 U.S. 452 (1932), presented another factual situation similar to the one in *Marron*. The Court cited *Go-Bart*, not *Marron*, as controlling in holding the search to be unreasonable. The Court found the search to be "exploratory and general" and the agents' conduct "unrestrained." *Id.* at 462-65.

The distinctions that may be drawn among *Go-Bart*, *Lefkowitz*, and *Marron* are superficial at best. All three involved the seizure of business documents from enclosed areas after an arrest had been made. Because of the difficulty involved in reconciling the latter two decisions with *Marron*, the search incident to arrest doctrine was thrown into a state of further disarray. *See* Aaronson and Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest*, 64 GEO. L.J. 53, 57-58 (1975) (no real distinction among the cases).

The doctrine was again given an expansive reading in Harris v. United States, 331 U.S. 145 (1947), *overruled*, Chimel v. California, 395 U.S. 752 (1969). F.B.I. agents obtained two warrants to search Harris' apartment for cancelled forged checks. Following Harris' arrest in the living room, one agent found a sealed envelope in a bedroom bureau. The envelope was opened and found to contain altered draft cards. 331 U.S. at 148-49. Despite the fact that the search had ranged over the entire apartment and the draft cards used to prosecute Harris were not the initial object of the search, the Court upheld the validity of the search. The Court ruled that Harris was in possession of the entire four room apartment, and that "fruits of the crime," whether specifically sought or not, may always be validly seized. *Id.* at 154-55.

Only one year after *Harris*, the Court handed down an enigmatic decision in Trupiano v. United States, 334 U.S. 699 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950). The arrest of the operator of an illegal distillery was upheld, but the subsequent search and seizure of his contraband equipment was held invalid since there had been ample time for the arresting agents to obtain a warrant. 334 U.S. at 705-06, 708. The Court denominated the close proximity of the equipment to the arrestee a "fortuitous circumstance . . . inadequate to legalize the seizure." *Id.* at 707-08, 710. The Court explicitly stated that warrants must be obtained whenever reasonably practicable and opined that the warrant exception appeared to be in danger of swallowing the principle. *Id.* at 708.

This apparent return to a more conservative search incident to arrest posture was contradicted only two years later. In United States v. Rabinowitz, 339 U.S. 56 (1950), *overruled*, Chimel v. California, 395 U.S. 752 (1969), the Court overruled *Trupiano* and apparently returned the *Harris* line of cases to viability: the reasonableness of the search after a lawful arrest, and not the practicability of obtaining a search warrant, was henceforth to be the dispositive factor. 339 U.S. at 66. In upholding a warrantless 1 ½ hour search incident to arrest, in which the desk, safe, and file cabinets in the arrestee's office were searched, the Court refused to opt for a "rule of thumb . . . [that] may be appealing from the vantage point of each administration." *Id.* at 65. [This position is belied by the Court's decisions in *Chimel* and *Belton* since both articulate just such rule-of-thumb standards.]

In Preston v. United States, 376 U.S. 364 (1964), the search of the arrestee's car, which had been towed to a garage and searched subsequent to the arrest, was held to be unjustified as a search incident to the arrest. The Court restated the *Marron* requirement for contemporaneity of the arrest and subsequent search: "But [the need to seize evidence or weapons is] absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.* at 367; *accord*, Chambers v. Maroney, 399 U.S. 42, 46-47 (1970) (search of vehicle at police station after arrest of occupants held invalid as search incident to arrest); Stoner v. California, 376 U.S. 483,

In 1969, the Court made an effort in *Chimel v. California*[100] to provide arresting officers with a workable rule for search and seizure situations and to bring stability to the search incident to lawful arrest area.

B. Chimel *and Recent Decisions Affecting the Scope of Search Incident to Arrest*

Chimel had been convicted on burglary charges.[101] The evidence used to convict Chimel was gathered in a warrantless search of his home subsequent to his arrest.[102] In finding the search invalid,[103] the Court, perhaps realizing that its decisions construing the search incident to arrest doctrine were not of one accord,[104] laid down a rule that would determine the reasonableness of such searches.[105] Drawing heavily from its decisions in *Preston v. United States*[106] and *Terry v. Ohio*,[107] the Court held that it was entirely reasonable for the arresting officer to effect a contemporaneous search of both the arrestee and the

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487 (1964) (search of arrestee's hotel room two days subsequent to arrest held invalid).

[100] 395 U.S. 752 (1969).

[101] *Id.* at 754.

[102] *Id.* at 753-54. The arresting officers were allowed to enter the house by Chimel's wife. Chimel arrived 10 to 15 minutes later and was arrested. He denied the officers permission to "look around"; nevertheless, the officers effected a search of the entire house, including the bedrooms, attic, garage, and workshop. During the search, which lasted approximately one hour, officers went so far as to direct Chimel's wife to open drawers and to make all contents visible. The search yielded some evidence of the burglary. Other items, however, were also seized. *Id.*

[103] *Id.* at 768.

[104] *See* Note, *Criminal Law: The Effect of Chimel v. California on Automobile Search and Seizure*, 23 OKLA. L. REV. 447, 449 (1970) (cases on the subject cannot be reconciled sufficiently) (quoting Abel v. United States, 362 U.S. 217, 235 (1960) (the exception has produced fluctuating views on the Court)).

[105] 395 U.S. at 762-63.

[106] 376 U.S. 364 (1964). In his opinion in *Preston*, Justice Black argued that the right of an officer to make a contemporaneous search of the arrestee's person and the area under the arrestee's immediate control was unquestioned. *Id.* at 367. The rationale in permitting such a search was to allow the officer to confiscate weapons or "fruits of the crime." *Id.* In *Preston* the Court overturned the conviction, ruling that a search of a car that had been towed to the station house was not contemporaneous with the arrest. *Id.* at 368.

[107] 392 U.S. 1 (1968). *Terry* dealt with the constitutionality of a stop and frisk. The analysis for this situation differs from that in a search incident to arrest, in that in a stop and frisk, neither a warrant nor probable cause need be present to entitle the officer to conduct a limited frisk of the suspect's outer garments. *Id.* at 20. This distinction, however, was deemed immaterial by the *Chimel* majority, which made the *Terry* right to frisk for weapons implicit in its ruling. 395 U.S. at 762-63.

area within his immediate control.[108] The Court limited, however, the areas in which the attendant search could be made. For example, where the search occurs within a house, the Court could find no justification for a search of any room other than the one in which the arrest occurs.[109] In articulating this portion of the *Chimel* standard, the Court overruled[110] *United States v. Rabinowitz*[111] and *Harris v. United States*,[112] two cases in which it had allowed what were arguably the most all-encompassing searches ever.

Viewed in context, then, the *Chimel* standard was not as broad as some decried it to be. Although the *Chimel* decision has been criticized,[113] it is recognized as the landmark case in determining the permissible scope of a search incident to arrest.[114]

Between 1969 and mid-1981, the *Chimel* doctrine spawned a host of litigation in the lower courts.[115] At least two circuits interpreted *Chimel* to mean that once the right to search attaches, it is not lost even though the arrestee may be handcuffed and unable to reach areas or objects otherwise within his immediate control.[116] There were also

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[108] 395 U.S. at 762-63. The Court stated that the purpose of the exception was to prevent destruction of evidence and to protect officers. *Id.* at 763-64.

[109] *Id.* at 763. Presumably, the Court imposed this limitation to eliminate, so far as possible, pretextual or purely exploratory searches. *Id.* at 767. The effective result may have been just the opposite. *See* Aaronson and Wallace, *supra* note 99, at 64 n.76, 65 (the *Chimel* standard encourages police to use any arrest as a pretext for personal searches).

[110] 395 U.S. at 768.

[111] 339 U.S. 56 (1950); *see supra* note 99.

[112] 331 U.S. 145 (1947); *see supra* note 99.

[113] *See* Aaronson and Wallace, *supra* note 99, at 62 (offers arrestee little protection from intrusion).

[114] New York v. Belton, 101 S. Ct. 2860, 2864 (1981); 1 W. RINGEL, *supra* note 14, § 12.1 (*Chimel* is the last word on constitutional rationale and standards on search incident to arrest).

[115] *See, e.g.*, United States v. Garcia, 605 F.2d 349, 350, 354 (7th Cir. 1979) (search of luggage 15 seconds after arrest for possession of drugs), *cert. denied*, 446 U.S. 984 (1980); United States v. Johnson, 561 F.2d 832, 836, 844 (D.C. Cir.) (search of basement apartment after police "secure" arrestees), *cert. denied*, 432 U.S. 907 (1977); United States v. Mason, 523 F.2d 1122, 1125-26 (D.C. Cir. 1975) (search of suitcase found in closet after defendant handcuffed); United States v. Patterson, 447 F.2d 424, 427 (10th Cir. 1971) (five officers present, one between arrestee and officer conducting the search), *cert. denied*, 404 U.S. 1064 (1972); State v. Marrero, 363 So. 2d 494, 498 (La. 1978) (arrestee handcuffed to bed during search); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 558 (1979) (search of hotel room while arrestee restrained), *cert. denied*, 446 U.S. 941 (1980).

[116] United States v. Eatherton, 519 F.2d 603, 609-11 (lst Cir. 1975); United States v. Kaye, 492 F.2d 744, 746 (6th Cir. 1974).

several lower court cases applying the *Chimel* doctrine to uphold searches of automobiles incident to an occupant's arrest.[117]

After *Chimel*, the Supreme Court handed down two significant decisions—*United States v. Robinson*[118] and *Gustafson v. Florida*[119]—that foreshadowed the Court's decision in *New York v. Belton*.[120]

In these cases, the Court upheld searches incident to arrest for crimes that were unlikely to involve weapons or contraband.[121] In *Robinson*, the Court, distinguishing *Terry v. Ohio*,[122] relied implicitly on the standard enunciated in *Chimel*.[123] In doing so, the Court reiterated that the authority to search incident to a lawful arrest does not depend on the probability that weapons or evidence will be found on the arrestee's person. Since a valid custodial arrest is considered a reasonable intrusion under the fourth amendment, a search incident to that arrest needs no further justification.[124] Such searches are there-

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[117] *See, e.g.*, United States v. Sanders, 631 F.2d 1309, 1313 (8th Cir. 1980) (package on floorboard "potentially available" to arrestee), *cert. denied*, 449 U.S. 1127 (1981); United States v. Dixon, 558 F.2d 919, 921-22 (9th Cir. 1977) (seizure of revolver on floorboard of car), *cert. denied*, 434 U.S. 1063 (1978); United States v. Frick, 490 F.2d 666, 669-72 (5th Cir. 1973) (briefcase readily accessible to arrestee), *cert. denied*, 419 U.S. 831 (1974); United States v. DeLeon, 412 F. Supp. 89, 97 (D.V.I. 1976) (both arrestees outside car during search); Hall v. State, 288 So. 2d 850, 852 (Miss. 1974) (search of car during actual arrest). *But see* United States v. Benson, 631 F.2d 1336, 1340 (8th Cir. 1980) (luggage under police control); United States v. Rigales, 630 F.2d 364, 368 (5th Cir. 1980) (zippered package reasonably believed to contain gun); United States v. Stevie, 582 F.2d 1175, 1180 n.6 (8th Cir. 1978) (search of suitcase in rear of station wagon while arrestees were outside), *cert. denied*, 443 U.S. 911 (1979); State v. Gaut, 357 So. 2d 513, 517 (La. 1978) (arrestee handcuffed in back seat of car).

[118] 414 U.S. 218 (1973).

[119] 414 U.S. 260 (1973).

[120] *See infra* notes 131-141 and accompanying text.

[121] United States v. Robinson, 414 U.S. at 236; Gustafson v. Florida, 414 U.S. at 263-64.

[122] *See supra* note 107. The court of appeals had relied on *Terry* to invalidate the search, concluding that the only justification for a full search was the possibility of discovering evidence of a crime. United States v. Robinson, 471 F.2d 1082, 1094-96 (1972), *rev'd*, 414 U.S. 218 (1973). The *Robinson* Court made it clear that the standards applied to a *Terry* stop and frisk case are different from those applied to a search incident to an arrest case. 414 U.S. at 233-35.

[123] 414 U.S. at 225-26 (citing Chimel v. California, 395 U.S. at 762-63).

[124] 414 U.S. at 235. The Court stated:

> It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id.

fore, in and of themselves, reasonable under the fourth amendment.[125] The conviction in *Gustafson* was affirmed on similar grounds.[126] The Court also implicitly reaffirmed its continuing reliance on the discretion of the arresting officer in deciding whether custodial arrest is necessary.[127]

This "bright line" rule, though welcomed by law enforcement officials, was not so well received in other quarters.[128] Some state courts, perhaps believing that *Robinson* interpreted the *Chimel* standard too liberally, circumvented the *Robinson* standard by interpreting their particular states' constitutions as conferring more protection upon the individual than does the federal constitution.[129] Other courts simply limited the instances in which custodial arrests may be made, thereby eliminating, at least in part, search situations similar to those in *Robinson* and *Gustafson*.[130]

C. *New York v. Belton*

The Supreme Court's most recent pronouncement on the search incident to arrest exception is *New York v. Belton*.[131] The facts in that case closely paralleled those in *Robbins v. California*.[132] Belton was one of four occupants of a car stopped by a New York state policeman for speeding. The arresting officer, finding evidence of marijuana in the car, ordered the occupants out of the vehicle and arrested them. In an

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[125] *Id.* In view of the forcefulness of the Court's statements about searches incident to arrest, it is interesting to consider a statement from the majority opinion by Justice Rehnquist: "Virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta." *Id.* at 230. Justice Rehnquist was apparently echoing a statement made earlier by Justice Frankfurter that the "hint" of this power contained in *Weeks* has been "loosely turned into dictum and finally elevated to a decision." United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).

[126] 414 U.S. at 266.

[127] *Id.* at 265.

[128] *See, e.g.*, Comment, *Searches Incident to Arrest: The Expanding Exception to the Warrant Requirement*, 63 GEO. L.J. 223, 231 nn.58-60 (1974) (*Chimel* and *Robinson* are irreconcilable). The author argues that the language in *Chimel* permitting an incidental search of the arrestee and the area within his immediate control does not permit the inflexible reading given it by *Robinson*. *Id.*

[129] *E.g.*, Zehrung v. State, 569 P.2d 189, 199-200 (Alaska 1977), *modified*, 573 P.2d 858, 859 (Alaska 1978); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 1113-14, 119 Cal. Rptr. 315, 325-26 (1975).

[130] *E.g.*, State v. Jetty, 579 P.2d 1228, 1230 (Mont. 1978); Beck v. State, 547 S.W.2d 266, 267-69 (Tex. Crim. App. 1976).

[131] 101 S. Ct. 2860 (1981).

[132] 101 S. Ct. 2841 (1981); *see supra* notes 81-86 and accompanying text.

ensuing search of the back seat of the car, the officer inspected the zippered pocket of a jacket belonging to Belton and found cocaine.[133] Belton was subsequently tried and found guilty of possession of a controlled substance, despite his contention that the evidence had been seized in violation of the fourth and fourteenth amendments.[134] The New York Court of Appeals reversed the conviction, finding that the search could not be justified under the search incident to arrest exception.[135]

The United States Supreme Court disagreed and reinstated Belton's conviction.[136] Under *Chimel*,[137] the officer clearly had the right to search the area within the arrestee's control. The difficulty came in defining the scope of that area. Because of the acknowledged need of a policeman to know the scope of his authority and the need of individuals to know the scope of their constitutional protection, the majority found that establishing a "bright line test" to determine the permissible scope of a search was preferable to making that determination on a case-by-case basis. Thus, the Court held that, in a search of an automobile incident to the lawful arrest of its occupant, the entire passenger compartment, including any containers, open or closed, may be searched.[138]

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[133] 101 S. Ct. at 2861-62.

[134] The decision of the trial court was not published. For a history of the case in trial court, see People v. Belton, 68 A.D.2d 198, 416 N.Y.S.2d 922, 923-24 (1979), *rev'd*, People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980), *rev'd sub nom.* New York v. Belton, 101 S. Ct. 2860 (1981).

[135] People v. Belton, 50 N.Y.2d 447, 452, 407 N.E.2d 420, 423, 429 N.Y.S.2d 574, 577 (1980), *rev'd sub nom.* New York v. Belton, 101 S. Ct. 2860 (1981).

[136] 101 S. Ct. at 2865.

[137] *See supra* notes 101-114 and accompanying text.

[138] 101 S. Ct. at 2864. Since the lawful custodial arrest overrides any privacy interest the occupant might have in containers in the passenger compartment, *id.*, it is irrelevant whether the container is clear or opaque, open or closed. This appears to be inconsistent with *Robbins*. *See id.* at 2870 (White, J., dissenting) (emphasizing privacy interest in containers established by *Robbins*).

Belton has been used to uphold convictions in several later decisions in the lower courts. *See, e.g.*, United States v. Mefford, 658 F.2d 588, 593 (8th Cir. 1981) (arrest on bus and search of paper bag); Virgin Islands v. Rascool, 657 F.2d 582, 593 (3d Cir. 1981) (revolver found in paper bag on back seat of vehicle); Ringo v. Dennis, No. 80-3323 (6th Cir. Oct. 22, 1981) (case "indistinguishable from *Belton*").

At least two search incident cases in which convictions were reversed have been remanded for further consideration in light of *Belton*. United States v. Benson, 631 F.2d 1336 (8th Cir. 1980), *cert. granted, vacated and remanded*, 49 U.S.L.W. 3978 (June 30, 1981); California v. Riegler, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980), *cert. granted, vacated and remanded*, 49 U.S.L.W. 3978 (June 30, 1981).

The Mississippi Supreme Court has used the *Belton* rule to uphold convictions in

In dissent, Justice Brennan stated that the majority had "created a fiction" in holding that the interior of a car is always within the immediate control of the arrestee.[139] He pointed out that in this case the arrestees were not in the vehicle when the search was conducted and, therefore, the interior of the vehicle was not within their control.[140] The crucial question, according to Justice Brennan, was not whether the arrestee could ever have reached the area or article searched, but whether he could have reached it at the time of the arrest.[141]

Conclusion

When *Belton* and *Robbins* are juxtaposed, the anomalous state of this area of constitutional law can easily be seen. If a closed, opaque container is in the passenger compartment of an automobile, it can be lawfully opened by police, without a warrant, relying on the search incident to arrest exception.[142] On the other hand, the same container could not be opened lawfully without a warrant if the police were relying on the automobile exception.[143] As one court, speaking in another context, has said, "[t]his is the kind of legal *tour de force* that most laymen cannot understand . . . ."[144]

When viewed in light of precedent, and in light of the rationale behind the exceptions under which *Belton* and *Robbins* were decided, they might arguably be consistent with previous Court decisions. However, the distinctions made in the cases seem arbitrary and technical, and the cases illustrate the basic conflict that exists between the exceptions.

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two recent cases. In Horton v. State, No. 52,998 (Miss. Jan. 27, 1982) (affirmed in part, reversed in part, and remanded for proper sentence) the court upheld the admissibility of marijuana and phencyclidine found in the defendant's car after his arrest for possession of beer. In Sanders v. State, 403 So. 2d 1288 (Miss. 1981), the Mississippi Supreme Court applied *Belton* to uphold the search of two purses found in the passenger compartment of the arrestee's automobile. The court quoted language from *Belton* to the effect that a search incident to arrest is limited to the passenger compartment. *Id.* at 1291. This is contrary to the prevalent view in Mississippi that a search incident to arrest may be "stem to stern." *See* Comment, *Search Incident to Arrest and the Automobile*, 43 Miss. L.J. 196, 210 (1972).

[139] 101 S. Ct. at 2867-69.

[140] *Id.* at 2867-68.

[141] *Id.* at 2868-69.

[142] *Id.* at 2864-65.

[143] Robbins v. California, 101 S. Ct. at 2847.

[144] Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 658 (9th Cir. 1972) (anomalous result when derivative jurisdiction principle applied to removal of federal antitrust claim).

The original rationale behind the automobile exception was that requiring an officer to obtain a warrant before searching an automobile was not practical because of the automobile's inherent mobility.[145] As an additional basis for the exception, the Court later observed that there was a lowered expectation of privacy in an automobile.[146]

Robbins' holding that, under the automobile exception, closed, opaque containers may not be searched without a warrant,[147] appears logical when viewed in light of the automobile exception's rationale. The Court observed that there is a greater expectation of privacy in a closed, opaque container than in a container that clearly announces its contents by its shape or transparency. However, a police officer who has probable cause to believe that the automobile contains contraband might reasonably infer, because of his experience, that the container also holds contraband. When, from the totality of the circumstances, a reasonable inference can be made that the container holds contraband, then it could be argued that the occupant has a lowered expectation of privacy; this might be analogized to the Court's holding in *Sanders* that recognized that a reduced expectation of privacy exists in containers whose "contents can be inferred from their outward appearance."[148] One who conceals contraband in a container commonly used for that purpose cannot claim a full expectation of privacy when confronted by a police officer who has expertise in such matters.[149]

It could also be argued that since there is no practical problem with the mobility of a container after it has been seized, the police could first seize the container and then obtain a warrant before opening it. The Court has rejected the premise underlying this argument, however, stating that there is no constitutional distinction between seizures and searches.[150]

Underlying the search incident to arrest exception is the need to ensure the safety of the arresting officer and the need to preserve evidence.[151] As distinguished from *Robbins*, the arrestee's privacy inter-

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[145] *See supra* notes 42-59 and accompanying text.

[146] *See supra* note 66.

[147] 101 S. Ct. at 2847.

[148] Arkansas v. Sanders, 442 U.S. at 764 n.13.

[149] The arresting officer in *Robbins* testified that he was aware that contraband was often wrapped in plastic garbage bags. Justice Rehnquist stated that this was "a fact of which all who watch the evening news are surely well aware." 101 S. Ct. at 2854 (Rehnquist, J., dissenting). From this, Justice Rehnquist concluded that the defendant could have had "no reasonable expectation of privacy in the contents of the garbage bag." *Id.*

[150] Chambers v. Maroney, 399 U.S. 42, 51-52 (1972).

[151] *See supra* note 108.

ests are not a factor in determining the constitutionality of the search.[152]

Belton can be made to harmonize with the "letter" of prior search incident to arrest law.[153] In choosing to define the "area within the arrestee's immediate control" in such an inflexible manner, however, the Court has broken from the spirit of the exception.[154] To make *Belton* consistent with the rationale of the search incident to arrest exception, one must accept as a fact that the occupants of an automobile, after being arrested, will *always* have access to the passenger compartment. Such an assumption will not always be justified. When the arrestee has been removed from the vehicle and has been reduced to the control of the arresting officer or officers, it is unreasonable to assume that he may obtain a weapon from the car or reach the passenger compartment and destroy evidence before being restrained again. If the Court wishes to preserve the spirit of the exception, it should use a situation-oriented measure of area within the arrestee's control rather than the rigid, unrealistic standard set forth in *Belton*.[155]

The question arises whether requiring such decisions "on the merits" by the arresting officer would create the uncertainty the *Belton* Court feared.[156] However, since this decision would require neither legal acumen nor genius, but only a common-sense determination of

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[152] New York v. Belton, 101 S. Ct. at 2864.

[153] *Chimel* drew upon the *Terry* "frisk" standard. *See supra* note 107 and accompanying text. *Robinson* was an extension of both *Chimel* and *Terry* in that it allowed a patdown search incident to a lawful arrest, despite the absence of reasonable suspicion that the search would produce either weapons or evidence. *See supra* note 121 and accompanying text. *Belton* may be viewed as expanding the *Robinson* search from persons to vehicles.

[154] 101 S. Ct. at 2869 (Brennan, J., dissenting). Justice Brennan states that "the Court's new rule abandons the justifications underlying *Chimel*." *Id.*

[155] The Court could have chosen, for example, to define the term "area within the immediate control of the arrestee" as a function of the number of officers present, the physical characteristics of the arrestees, their mental and physical state, the manner in which the arrestees are restrained, proximity of the arrestees to the vehicle, whether the arrest is made in daylight or darkness, and other such factors. Using such a standard, the Court could still have upheld the *Belton* search. Trooper Nicot was alone with four arrestees. Although they were out of the car, the jackets could have been reached had the men been willing to risk overwhelming Nicot. It could convincingly be argued that Nicot, at the time of his search, had not conclusively and safely reduced the arrestees and their property to his complete control as a matter of law. *See* Chimel v. California, 395 U.S. at 763 (exclusive control means no significant risk that arrestee or confederates might gain control of weapon/evidence); People v. Crawl, 401 Mich. 1, 257 N.W.2d 86, 89 (1977) (search valid if potential for danger exists and officer does not have control of situation).

[156] 101 S. Ct. at 2864.

whether the arrestee can reach a weapon or evidence, law enforcement officials should not be overly perplexed about the scope of their authority. Under such a standard, then, searches of closed containers would create far fewer cases as irreconcilable as *Robbins* and *Belton.*

There is little or no procedural or substantive difference in the arrests and seizures conducted in the two cases. Consider that in both cases, the arresting officer smelled marijuana, moved the occupant away from the vehicle, found marijuana in the vehicle, arrested the defendant,[157] searched the car's passenger compartment (the rear of the station wagon in *Robbins*), looked in opaque containers found there, and discovered evidence subsequently used to convict the arrestee. It could be argued that: (1) the second *Robbins* search was a search incident to arrest; (2) the area "within the passenger compartment" includes a recessed luggage compartment in the rear of a station wagon since it can be accessed from within; and (3) using the *Belton* standard, the subsequent search of the opaque containers would be a valid search incident to arrest.

The inequity of such a result is obvious. In cases such as *Robbins* and *Belton,* where the facts are virtually indistinguishable, the fine distinction that one search is characterized as an automobile exception search while the other is characterized as a search incident to arrest should not result in different holdings. In view of the Court's reluctance, however, to fashion one rule applicable to all automobile searches, such conflicting decisions are likely to continue.[158]

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[157] *See supra* note 86.

[158] The validity of this statement is borne out by events subsequent to the Supreme Court's decisions in *Robbins* and *Belton.* With respect to the automobile exception, the Supreme Court has agreed to reconsider the holding in *Robbins.* United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981), *cert. granted,* 50 U.S.L.W. (U.S. Oct. 13, 1981) (No. 80-2209). In oral argument, the United States contended that a warrantless search of some containers, such as the unsealed paper bag in *Ross,* should not violate fourth amendment standards since such bags are unlikely to contain personal effects, and that a paper bag is no more deserving of privacy than a glove compartment or trunk of a car. 30 Crim. L.R. 4240, 4241 (U.S. Mar. 19, 1982) (No. 80-2209). If this argument prevails, *Robbins* will obviously be weakened, and a new question will be raised: what containers may be categorized as " unlikely to contain personal effects"?

In a most enigmatic opinion, the New York Court of Appeals, rather than simply affirming the Supreme Court's decision in *New York v. Belton* on remand, chose to uphold the decision, but did so under the New York State Constitution and the *automobile exception* rather than as a search incident to arrest. New York v. Belton, 59 N.Y.2d 49 (1982). In doing so, the court used a rationale that seems to fly in the face of previous

Supreme Court automobile exceptions and non-search incident to arrest container cases. The decision is especially confusing when one considers that this same court *reversed* Belton's conviction upon first hearing the case, People v. Belton, 50 N.Y.2d 447, 452, 407 N.E.2d 420, 423, 429 N.Y.S.2d 574, 577 (1980), *rev'd sub. nom.* New York v. Belton, 101 S. Ct. 2860 (1981), and that at no time was the automobile exception pled by the prosecution as justification for the search.

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